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Supreme Court of the United States

OCTOBER TERM, 1936

C. R. TOWNSEND and PARK BERNARD, a partnership known as TOWNSEND & BERNARD, doing business as COOK COUNTY WAREHOUSE, et al,

Appellants,

versus

M. J. YEOMANS, Attorney-General for the State of Georgia, et al,

Appellees.

No. 781

BRIEF ON BEHALF OF APPELLANTS

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April 26, 1937.

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versus

M. J. YEOMANS, Attorney-General for the State of Georgia, et al,

Appellees.

No. 781

BRIEF ON BEHALF OF APPELLANTS

I

STATEMENT AS TO JURISDICTION AND NATURE OF THE APPEAL

This is an appeal from a final decree of the United States District Court for the Middle District of Georgia, wherein a specially organized statutory court, consisting of Circuit

Judge E. R. Holmes, District Judge William H. Barrett, and District Judge Bascom S. Deaver, denied a permanent injunction prayed for by complainants below (appellants here) and dismissed their bill, Judge Deaver dissenting.

The final decree was dated and entered November 27, 1936, and found in favor of defendants below (appellees here) all issues of law and fact and dismissed the bill, R. p. 96. The findings of fact, conclusions of law, and the opinion of the majority members of the court and the dissent of Judge Deaver, were filed October 19, 1936, and are not yet reported, R. pp. 74, 88.

Probable jurisdiction of this Court was noted March 29, 1937, on the basis of appellants' Statement as to Jurisdiction, duly served and filed pursuant to Paragraph 1, Rule 12, of this Court.

The appeal is of right under Section 238 of the Judicial Code as amended by the Act of Congress of February 13, 1925, (Chapter 229, Par. 1, 43 Statutes 938, 28 U.S.C.A. 345), and also Section 266 of the Judicial Code as amended by the Act of Congress of February 13, 1925, (Chapter 229, Par. 1, 43 Statutes 938, 28 U.S.C.A. 380).

II

STATEMENT OF THE CASE

(a) Status of the Case

Appellants are tobacco warehousemen who carried on their businesses as such in the State of Georgia in 1935 and 1936.

On July 25, 1935, after due notice to the Governor of the State of Georgia and the Attorney-General, R. p. 22, they brought their bill in the United States District Court for the Middle District of Georgia, R. pp. 1, 35, 52, challenging the constitutionality of an Act of the General Assembly of Georgia, approved March 28, 1935, which is as follows:

"An Act to Create an act fixing a maximum charge by leaf tobacco warehouses of this State for selling and handling leaf tobacco and for other purposes.

"Section 1. Be it enacted by the General Assembly and the same is hereby enacted by authority of the same, That beginning with the enactment and approval of this Act, that maximum charges and expenses of handling and selling leaf tobacco upon the floor of the tobacco warehouses of this State shall not exceed the following schedule, to-wit:

"For auction fees fifteen cents (15) on all piles of one hundred pounds (100) or less and twenty-five cents (25) on all piles over one hundred pounds (100). For weighing and handling ten cents (10) per pile of all piles of one hundred (100) pounds and ten cents (10) for each additional one hundred pounds (100) for commissions on the gross sales of

leaf tobacco in said warehouses not to exceed two and one-half per cent (2½) of said gross sales. The proprietor of each and every warehouse shall render to each seller of tobacco at his warehouse a bill plainly stating the amount charged for weighing and handling, the amounts charged for auction fees, and the amounts charged for commissions on each sale.

"Section 2. Every proprietor or person operating a leaf tobacco warehouse in this State shall keep a correct account of all tobacco sold on the floor of his tobacco warehouse. Said account must show the correct amounts of leaf tobacco of first sale each day. The correct amounts resold each day by others upon the floor of said warehouses, and each and every proprietor or person operating a leaf tobacco warehouse in this State shall publish or cause to be published not later than thirty (30) days after close of selling season at said warehouse to be published in a newspaper of wide circulation located in the same county of the said warehouse, a correct statement showing all leaf tobacco of first sale by said warehouse, all tobacco resold by said warehouse and all tobacco resold by others upon the floor of said warehouse during selling season of the same year.

"Section 3. Upon the passage and approval of this bill it shall be unlawful for any charges in excess of those named in this bill to be made or accepted and any proprietor or person in charge of a leaf tobacco warehouse in this State violating this act shall be guilty of a misdemeanor and punished for the same.

"Section 4. That all laws and parts of laws in conflict with this Act be, and the same are hereby repealed."

(R. p. 15.)

The State of Georgia, by and through her Attorney-General, Honorable M. J. Yeomans, the Solicitors-General of the eight Judicial Circuits in the tobacco producing area of the State, the Sheriffs of the thirteen counties in which are located tobacco warehouses of appellants, and the Solicitors of the City Courts of ten of these counties, R. p. 3, and by amendment six of these officials in their individual capacities as growers of tobacco, members of a class, R. p. 38, were all named respondents.

The original bill, R. p. 1, and two amendments thereto, R. pp. 35, 52, challenged the above quoted Act on these grounds:

(a) The business of handling and selling leaf tobacco is not impressed with public interest, and is not subject to regulation by the General Assembly of Georgia;

(b) Said business is not so impressed with a public interest as to empower the General Assembly of Georgia to control any or all of the aforementioned charges;

(c) The General Assembly of Georgia is without power or jurisdiction to enact or to enforce the purported enactment hereinabove quoted;

(d) The schedule of charges in force prior to the enactment of the aforesaid Act are fair and reasonable and have been satisfactory to the growers and sellers of tobacco in the State of Georgia;

(e) The schedule of charges prescribed by the purported enactment of the General Assembly will produce a reduction of from twenty to thirty per cent in the income of plaintiffs;

(f) The charges prescribed by the purported enactment of the General Assembly are unjust and unreason-

able and will not provide your plaintiffs an adequate reward for the time and services rendered and for the use of their respective properties;

(g) Plaintiffs have no adequate remedy at law, and equity must intervene to prevent a multiplicity of suits;

(h) The said schedule of maximum charges prescribed by said purported Act, if put into effect, will deprive each plaintiff of his, their, or its property without due process of law, and will deprive him, them or it of the equal protection of the law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States;

(i) Plaintiffs are entitled to a safe and adequate judicial review of the schedule of charges purported to be enacted by the General Assembly of Georgia;

(j) The State of Georgia, through its legislative department, has and had no jurisdiction over the subject matter of said purported Act;

(k) Said purported Act is unreasonable, arbitrary and capricious in its operation and effect, and cannot be sustained when measured by the facts relevant thereto;

(l) The said purported Act is not a reasonable exertion of governmental authority for the following reasons:

1. The same was adopted without an investigation or examination of the relevant facts surrounding the business called that of tobacco warehousing in Georgia;

2. There has been no board or other body created to ascertain the facts surrounding this business, the manner in which it is conducted, the cost thereof, the returns therefrom, and the relation between the cost of business done, and rewards received therefor;

3. Said Act was adopted without providing to the persons of interest the means of a hearing thereon, without the right to have witnesses, and without proper investigation and adequate determination of the facts;

4. The said Act, fixing the prices to be charged, has no relation to the public health and is not based upon any requirement of public needs, and the regulation of charges has no real or substantial relation to any object or purpose sought to be attained by said Act, and it has no purpose to the rectifying of which regulation is a reasonable or appropriate means;

5. Said Act, in so far as it undertakes to control prices and charges, is arbitrary and irrelevant to the policy of the Legislature, and unnecessary and unwarranted interference with the right of individual contracts;

6. The schedule of charges prescribed by the purported Act of the General Assembly does not provide adequate compensation to plaintiffs for the time, services and risk attendant upon the conduct of said business, and will not provide an adequate reward or return on investments and outlays made by plaintiffs in carrying on said business;

7. Said Act was not enacted in response to any emergency;

8. Said schedule of charges prescribed by said purported Act undertakes to make a hard and fast schedule, which is unreasonable, arbitrary and capricious in view of the various factors that enter into each season's operation of plaintiff's business, and is not subject to variation as production and quality vary from year to year.

(m) The Legislature of the State of Georgia has no power to regulate tobacco warehouses, in that the buying

and selling of tobacco, which is an integral part of plaintiff's business, as carried on in the State of Georgia, is interstate commerce, and the purported enactment of the General Assembly places an unreasonable and undue burden on interstate commerce, and what power of regulation exists resides in the Congress of the United States alone;

(n) The schedule of charges fixed by the purported Act of the General Assembly of Georgia is confiscatory.

These several grounds of attack may well be condensed to the following general contentions:

1. The absence of power in the General Assembly of Georgia to enact the statute;

2. Assuming power in the State Legislature, the particular Act is an unreasonable, arbitrary and capricious exercise of the State police power.

Defensive pleadings were filed by all the respondents below (appellees here) R. pp. 26, 45, 54. They appeared at the preliminary hearings through counsel.

Honorable Bascom S. Deaver, Judge of the United States District Court for the Middle District of Georgia, on July 27, 1935, entered an order temporarily restraining and enjoining the defendants from enforcing the Act, under conditions therein set out, R. p. 23. Immediately he called to his assistance Circuit Judge Nathan P. Bryan and District Judge William H. Barrett for the interlocutory hearing, R. p. 34.

The specially constituted statutory court ordered on September 5, 1935, that a Special Examiner proceed to take the testimony, R. p. 57. By consent of counsel the temporary

restraining order was continued and it was agreed that the hearing, when had before the special statutory court, should dispose of the cause finally and permanent relief be granted or denied.

Extensive hearings were had by the Examiner and voluminous evidence taken over a period of several months.

On January 31, 1936, the cause came on for hearing before Circuit Judge Richard N. Walker, District Judge Barrett, and District Judge Deaver,—Judge Bryan having died August 31, 1935, Judge Walker was called to take his place. At this hearing the court, on its own motion, referred the entire cause to a Master, appointing the Examiner, Mr. J. N. Talley, to make findings of fact and conclusions of law on all issues in the cause, R. p. 61; Mr. Talley suffered a severe illness and was unable to complete his work.

Judge Walker died April 10, 1936, and Circuit Judge Edwin R. Holmes was called to take his place. On July 15, 1936, the matter came on for hearing before Circuit Judge Holmes, District Judge Barrett and District Judge Deaver, and on motion the order of reference was revoked and the cause set down for hearing on the record as then made up, R. p. 73. The court directed that the report of the Special Master, Mr. Talley, be filed for use of counsel and the court and that briefs be prepared and submitted.

The incomplete findings of the Special Master were adopted almost verbatim by the majority of the court in its findings of fact which were filed October 19, 1936, R. p. 76. Judge Deaver filed on that date a dissenting opinion, R. p. 88, disagreeing with some of the Special Master's findings as

approved by the majority of the court and also some of the additional findings of fact and conclusions of law as made by the majority members of the court.

A final decree was entered November 27, 1936, pursuant to the majority opinion, which found in favor of respondents below all issues of law and fact, denied all prayers of the original bill as amended, and dismissed the bill at the cost of the complainants, R. p. 96.

(b) THE UNDISPUTED FACTS OF THIS CAUSE.

The vast majority of the facts developed by the evidence in this cause are not seriously disputed. It is rather the conclusions, inferences, or deductions from these admitted facts and the application of legal principles to them that form the real bases of this appeal.

Perhaps as clear and concise a statement of the undisputed facts as could be made is found in the findings of fact of the District Court, numbered 1 to 9, inclusive, 11, 12, 14, a part of 15, and 16, which are as follows:

> "1. This suit is brought by the complainants named in the bill. Three of the complainants are corporations, three are individuals doing business under trade names, and sixty-seven are members of thirty partnerships, as set out in the bill.
>
> "2. The defendants described as officers are as named in the bill and hold the official positions therein stated, to-wit: Attorney-General for the State of Georgia, the Solicitors-General of eight judicial circuits, the sheriffs of fifteen counties, and Solicitors of the City Courts of eleven counties of Georgia, and five of the defendants

who are named as sheriffs of their respective counties are also parties defendant as members of the class of growers of leaf tobacco and as representatives of the class of sellers of such tobacco in the warehouses described in the original bill.

"3. In this proceeding the amount and value involved exceeds the sum of three thousand dollars, exclusive of interest and costs. Each of the complainants has more than three thousand dollars involved in the subject matter of this litigation.

"4. Complainants are engaged in the business of handling and selling loose-leaf tobacco in the State of Georgia, and a majority of the complainants have been so engaged for several years. The number of warehouses operated and the number of warehousemen engaged in their operation both vary from year to year.

"5. For many years prior to 1917 the farmers in southern Georgia largely relied upon cotton as their chief money crop. The coming of the boll weevil, however, caused them to seek in tobacco a new source of revenue. Experienced men, called 'demonstrators,' from the Carolinas and other tobacco growing States, were engaged by the Georgia farmers to assist them in the selection of suitable soil and instruct them in the science of growing and curing tobacco. By 1925 the industry was becoming well established and two years later the employment of demonstrators had almost entirely been abandoned.

"The type of tobacco grown in Georgia is the 'bright leaf' and is almost exclusively used in the manufacture of cigarettes. This variety is grown extensively in North Carolina, to a much less extent in South Carolina and Georgia, and to some extent in Virginia, Kentucky and Tennessee.

"From small beginnings in 1917 the cultivation of tobacco has become an important industry. The acreage planted in tobacco by the individual farmer is comparatively small, but on account of the necessity of finding adaptable soil, the aggregate acreage is now not only very considerable but widely distributed over a large area in the southern portion of the State. In 1930 the sales of tobacco through the warehouses in Georgia reached a total of 106,483,019 pounds, and the sales during the tobacco season of 1933 realized the sum of $13,582,912.71.

"6. The necessity for markets and the early maturity of tobacco in Georgia presented an opportunity which was early recognized by skilled and experienced warehousemen operating in the tobacco belts of North Carolina and other States having selling seasons which begin some time after the termination of the selling season in Georgia.

"With few exceptions there are and have been resident in Georgia no competent warehousemen, or skilled and experienced auctioneers, calculators, clip-men, weighers, pay-off men, and similar experienced help to assist warehousemen in handling and selling tobacco at warehouse auction sales.

"In order to sell their tobacco in warehouses located in Georgia, such warehouse must be operated, with possibly few exceptions, by warehousemen from other tobacco States and the warehouseman must employ and bring to Georgia skilled assistants from other tobacco growing States.

"Of the forty-five warehouses operated in 1935, thirty-nine were operated by warehousemen who also operated or were connected in some capacity with the operation of warehouses in North Carolina, Kentucky, Virginia or Tennessee. The South Carolina selling sea-

son opens about ten days later than the Georgia season. The two seasons, therefore, conflict to such extent as to prevent warehousemen and skilled help coming to Georgia from that State.

"7. The principal purchasers of the bright leaf tobacco grown in Georgia and in other States are limited to a few large manufacturers of cigarettes. 'The Companies' they are called by the warehousemen in their testimony. The Companies purchase tobacco only at warehouse auction sales, and only at warehouses to which they send or furnish 'buyers.' Each 'Buyer' is the representative of one of the competing purchasers, a 'set of buyers' usually from eight to twelve in number, is made up of representatives from each of the purchasing cigarette manufacturing companies. The presence of a 'set of buyers' is essential at such auction sale. A town in which is located one or more warehouses is known as a 'market.' If one set of buyers is allotted it is known as a 'one-set market.' The manufacturers by sending a set of buyers to a new warehouse may recognize a new market and by refusing to send one to an old market may cause its abandonment, and by sending either one or two sets of buyers to a given market may determine the rapidity with which the accumulated tobacco may be disposed of at auction.

"Another class of purchasers is known as 'speculators.' On rare occasions, a speculator purchases tobacco from a grower and has it transported to a warehouse for sale. At auction sales, speculators to a comparatively limited extent, in comparison with buyers, purchase tobacco for a later sale.

"8. The tobacco belt comprises approximately twenty counties in the southern portion of the State, and in 1935 contained fifteen towns known as 'markets,' in which were operated forty-five warehouses operated that year by complainants as warehousemen. Seven of the

markets were furnished one set of buyers and eight were furnished two sets. The two-set markets had a total of thirty and the one-set markets a total of fifteen warehouses in operation.

"The number of warehouses operated varies from year to year. In 1931 fifty-one warehouses were operated in twenty-one markets; in 1933 forty-two were operated, and in 1934, thirty-nine. Since 1932 the number of markets has remained at fifteen.

"The quantity of tobacco sold in the warehouses located in the tobacco belt and as well the price received fluctuates from year to year as will appear from the following statement of aggregate sales and average prices for the years 1930 to 1935, inclusive:

Year	*Gross Sales*	*Value*	*Average Price per Pound*
1930	106,483,019 lbs.	$10,501,228.63	9.86 cents
1931	60,881,696 lbs.	3,901,841.66	6.41 cents
1932	12,171,179 lbs.	1,267,211.07	10.40 cents
1933	59,853,963 lbs.	6,764,125.31	11.30 cents
1934	33,623,475 lbs.	6,299,751.96	16.73 cents
1935	71,826,352 lbs.	13,582,912.71	18.91 cents

"9. In the normal and customary course of marketing in Georgia tobacco can only be sold in warehouses located in the tobacco belt of that State.

"11. The Georgia tobacco warehouse Act, approved March 28, 1936, a copy of which may be found herein at page —, prescribed a schedule of maximum commissions and fees which may be lawfully charged by proprietors or persons in charge of warehouses for their services in handling and selling leaf tobacco in warehouses in the State of Georgia. The schedule so prescribed is as follows:

Commissions: Two and one-half per cent (2½%) on gross sales;

Auction Fees: Fifteen cents on all piles of 100 pounds or less; twenty-five cents on all piles over 100 pounds;

Weighing and Handling: Ten cents per pile of 100 pounds or less, and ten cents for each additional 100 pounds.

"Under the statutory maximum schedule of charges the item of commissions, two and one-half per cent, remains the same as in the 'former charges,' or those being made at the time the Act was passed. The reduction of former charges made by the Act is confined to the two items, auction fees and fees for weighing and handling. The percentage reduction is difficult of exact determination because it depends upon the number of the weight of all piles of tobacco handled.

"The said Act of 1935, if enforced, will reduce the amounts (gross income) received by warehousemen for their services under the former schedule of charges by approximately twenty (our figure) per cent.

"The difference in dollars between the amount the complainants would have received for their services in 1935 based upon the former or higher schedule and the amount they would be entitled to receive under the statutory or lower schedule is $115,920.90, the amount deposited in the registry.

"12. There is strenuous and expensive competition between warehousemen in securing tobacco from growers to be handled and sold in their respective warehouses, but in the sale of tobacco there is no competition except such as exists between the respective buyers and speculators at the auction sales and the bids of the warehouseman himself. For their services, the warehousemen throughout the tobacco belt uniformly deduct from the purchase price stated amounts according to their established schedule.

"14. After tobacco has been cured and is ready for the market the grower grades it, as best he can, and the resulting 'piles' of loose leaves are placed in sheets, which are then tied and the tobacco is so transported to the selected warehouse for sale. There the warehouseman and his employees take charge. The tobacco is unloaded, the piles dumped into flat baskets, the sheets removed, the tobacco weighed, and there is placed on the basket a ticket giving the name of the owner and the weight of the pile. The baskets of tobacco are then placed in long parallel rows along the floor of the warehouse.

"Auction sales in a 'market' are held daily during five days of the week, and in a particular warehouse as often as sufficient tobacco accumulates and a set of buyers go to another, but sales usually begin at nine o'clock in the morning. For the reason above stated the number of sale days at a particular warehouse during the selling season is a variable quantity.

"It is essential that there be present, the warehouseman, an auctioneer, and other skilled help who are employed by the warehousemen, and one set of buyers.

"As the informal procession moves along the row each basket of tobacco is offered for sale by the auctioneer and such is the rapidity of movements that sales are made at an average rate of six baskets per minute.

"The warehouseman starts the auction of each basket by making the opening bid. If this is not taken or raised by another, the warehouseman generally becomes the purchaser of the tobacco for his own account. If not sold in this summary fashion, the bidding for the basket continues until its sale is announced by the auctioneer, and a card is dropped on the pile giving the name of the purchaser and the amount of his bid. The grower or other owner, however, has the right to turn down the sale

and this may be accomplished by turning over the card. The grower in such case may hold his tobacco for a later sale or remove it from the warehouse. Immediately after a sale of a lot has been completed the tobacco sold is delivered to the purchaser, who removes it from the floor. It is re-weighed by the purchaser, who, usually several days later, makes payment to the warehouseman, and this is based upon the re-weight of the tobacco, less a small amount for shrinkage. As soon as the sale of a lot is completed the warehouseman pays to the seller the purchase price of the tobacco, less warehouse charges. This payment is made upon the basis of the weight of the tobacco after it reaches the warehouse and before being placed on the floor for sale. While an auction sale is in progress the warehouseman from time to time makes bids for baskets being offered. The purpose of this bidding, as well as of making the opening bid, is to boost the bidding of the buyers and speculators, in an effort to secure for the seller the best price obtainable. The tobacco so purchased as above by the warehouseman is afterwards also sold at auction, and may result in a profit or a loss to the warehouseman, and is shown in his 'leaf account.' References to 'gross sales' in this report are to gross 'first hand' sales and re-sales are not included. During the progress of auction sales a considerable quantity of tobacco leaves are left on the floor. This is known as 'sweepings' or 'scoop,' is sold by the warehouseman and the amount received for it carried into his 'leaf account' where it may reduce the loss shown by that account. The balance shown by that account appears in the warehouseman's statement of income as an added item.

"15. The tobacco selling season in Georgia is from three to five weeks in length. The 1935 season began on the first day of August and closed on the twenty-first day of the same month.

"The tobacco is ready for the market the latter part of July or early in August dependent upon the growing conditions. The exact date for opening the selling season is fixed by the manufacturers of tobacco, who are the principal buyers, and the warehousemen who operate warehouses in the tobacco belt. The exact closing date is fixed by the warehousemen and the buyers at the several markets. . . .

"16. Statutes fixing the same scale of charges as proposed in the Georgia Act of 1935 are the same in North Carolina and South Carolina. The scale of charges heretofore in effect in Georgia is not so high as the non-statutory Tennessee or Kentucky charges. No attack has been made upon the constitutionality of the Carolina statutes."

We do earnestly contend that the findings of fact,—which we consider to be rather inferences, conclusions or deductions, numbered 10, 13, 17 to 23 inclusive, by the District Court, do not find support in this record.

III

ASSIGNMENT OF ERRORS

Appellants rely upon each and all of the errors assigned by them and each of the points made in their Statement of Points to be Relied on, duly filed in accordance with Paragraph 9 of Rule 13 of this Court, R. p. 710. The assignment of errors is found at Record page 101, et seq., and the errors assigned are as follows:

"The statutory District Court erred:

"1. In entering its final decree dated the 27th day of November, A.D. 1936, wherein it ordered, adjudged and decreed 'that all issues of fact and law involved be, and the same are, found in favor of the defendants and against complainants (appellants) as set out in the findings of fact and conclusions of law made and entered by the majority members of the Court' and denying all the prayers of the bill of complaint as amended, and dismissing said bill of complaint as amended, at appellants' cost and vacating the restraining order theretofore granted by said Court in this cause. The said finding is contrary to the evidence, without evidence to support it, and is contrary to law.

"2. In adjudging and finding that:

" '(10) Prior to 1927 the tobacco warehousemen in Georgia for many years, if not from the beginning of the industry, had maintained and exacted from sellers of tobacco a uniform schedule of charges substantially, if not identically, the same as the schedule fixed by the Act of 1935 the validity of which is now being challenged by complainants';

for that said finding of fact is contrary to the evidence and is without evidence to support it.

"3. In adjudging and finding that:

"'(13) By reason of their (appellants) control of the warehouses in which tobacco is sold, in the normal and customary course of marketing in Georgia, the warehousemen have, unless regulated by law, an unduly coercive control over prices charged the growers for services';

for that said finding is contrary to the evidence and is without evidence to support the same.

"4. In adjudging and finding that:

"'(17) The propriety of charging materially or any more for handling tobacco in Georgia than in the Carolinas is not established.'

for that said finding is contrary to the evidence and is without evidence to support the same.

"5. In adjudging and finding that:

"'(19) It is not proven what each or any warehouseman, individual or corporate, lost in revenue by reason of the scale of charges prescribed by the act attacked. It is not denied that some warehousemen (appellants) earned a satisfactory profit. It is not proven that in instances where a loss occurred such loss was not due to excessive competition, ill advised loans, unnecessary expenses in buying influence or hauling customers' tobacco, or other causes than the reduction in charges. The testimony as to the effects of the act attacked is as to the group of warehousemen who are complainants (appellants), rather than to the effect on each one, and even then it is not proven that all the

losses are traceable to the reduction in charges rather than to other causes.'

"Said finding is contrary to the evidence and without evidence to support it; and is contrary to law in that said finding puts on complainants an undue burden of proof.

"6. In adjudging and finding that:

"'(20) The complainants through the warehousemen's Association and their common agreement as to the fees to be charged by them for services rendered maintain and enjoy a virtual monopoly in the field covered by their operations';

for that said finding is contrary to the evidence and without evidence to support it and is contrary to law.

"7. In adjudging and finding that:

"'(21) The business of tobacco warehousemen as conducted in Georgia in the year 1935 and for some years prior thereto was such as to cause it to be "affected with a public interest" and "clothed with a public use."'

"Said finding is contrary to the evidence and without evidence to support it, and is contrary to law.

"8. In adjudging and finding that:

"'(22) The scale of charges prescribed by the said Georgia Act of 1935 is not unreasonable, arbitrary and capricious and is reasonably adapted to accomplish the desired results.'

"Said finding is contrary to the evidence and the Court should have found on the record that the scale of charges prescribed by the said Georgia Act of 1935 is unreasonable,

arbitrary and capricious; that said Act is unreasonable, arbitrary and capricious as it affects and applies to each appellant and as it has affected and applied to each of them at all the times involved in this cause, and that said Act and the enforcement thereof has the effect of depriving each and all the appellants of their respective properties without due process of law, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

"9. In adjudging and finding that:

" '(23) The fixing of a scale of prices for services rendered by the warehousemen does not burden or interfere with interstate commerce.'

"Said finding is assigned as error for that the transactions complained of were each and all in interstate and foreign commerce; that the auction sales of the tobacco in Georgia by the warehousemen and the offering of the tobacco for sale in parcels at said auction sales and the sale and purchase of the same were for shipment out of the State of Georgia in interstate and foreign commerce, and the State of Georgia had no power to fix the maximum charges to be made by appellants who are the owners or operators of said tobacco warehouses for that the fixing of said prices for said services was the fixing and regulating of charges for carrying on interstate and foreign commerce and intercourse in interstate and foreign commerce and was an unlawful burden on such commerce and contrary to the provisions of Article I, Section 8, paragraph 3, of the Constitution of the United States, which is as follows:

'The Congress shall have power . . . To regulate

commerce with foreign nations also with the several States and with Indian tribes,'

upon which appellants rely.

"10. For that the Court erred in its fourth conclusion of law in finding and holding as follows:

" 'As we understand the contention of complainants it is, that because the acts of the warehousemen constitute one step in getting the tobacco to the manufacturers and such manufacturers all, or practically all, reside out of this State and it was known at the time the services were rendered by the warehousemen that the ultimate destination of the tobacco would be out of this State, that such services constituted a part of interstate commerce. We cannot agree with this contention. If sound, logically it would lead us to the conclusion that the very planting and harvesting of tobacco were parts of interstate commerce, for the reason that each of such acts was with the knowledge that all or practically all of the tobacco would ultimately move out of this State.' The court cites *Chasseniel v. Greenwood*, 291 U. S. 584, 587.

"Whereas, the Court should have found on the record and should have held that after the tobacco had been grown, assorted and brought to the warehouses and put in rows, it was offered for sale at auction to the buyers; that those buyers in the instances at hand were non-residents of the State of Georgia and representatives of tobacco manufacturing companies located out of the State of Georgia and in the United States and foreign countries; that the tobacco was delivered upon the close of the auction to those persons for shipment to points of destination out of the State of Georgia and in the United States or foreign countries; that no place of manufacture of tobacco of the kind grown in

Georgia as sold at the warehouses involved is located in the State of Georgia; and the Court should also have found that the sales at these auctions were made in the process of transfer of the tobacco from Georgia in interstate and foreign commerce and that the offering of the tobacco for sale, the bidding thereon and the sale thereof were in fact intercourse in interstate and foreign commerce and the business of tobacco warehousing as carried on by each of appellants is as instrumentality of interstate and foreign commerce and the fixing of the charges to be made by the tobacco warehousemen (appellants in this cause) was a direct burden upon that commerce and upon the actual direct conduct of said commerce, contrary to the provisions of the Constitution of the United States (Article I, Section 8, paragraph 3, of said Constitution, which has been hereinbefore set out)."

IV

SUMMARY OF ARGUMENT

POINT A (page 29)

Findings of fact made by the District Court and numbered 10, 13, 17, 18, 19, 20, 21, 22 and 23 are not lawful and proper findings.

(1) They are contrary to the other findings of the court and the evidence in the record and without evidence to support them.

(2) They are not, in legal contemplation, findings of fact, but are unwarranted inferences or deductions from insufficient, if not non-existent, facts.

(3) These findings, in so far as they are necessary to support the decree of the court, are inadequate and contain no basic intermediate findings essential to the ultimate conclusions therein attempted to be stated.

POINT B (page 69)

The business of tobacco warehouses, as carried on by these appellants in Georgia, in 1935, is not a business subject to regulation by the General Assembly of the State of Georgia with relation to price fixing.

(1) This business under the facts of this case, not contradicted, and as actually conducted in the State of Georgia, is interstate and foreign commerce. There are no tobacco manufacturers, that is, cigarette manufacturers, within the State of Georgia,

and every pound, practically, of Georgia-grown leaf tobacco is shipped to other States or foreign countries so soon as it is sold in appellants' warehouse. The tobacco enters "the stream of commerce" so soon as it is placed on the floor of the warehouse for sale.

(2) The business is an instrumentality of interstate and foreign commerce.

(3) The governmental power to regulate and fix charges, if it exists at all, is in the exclusive domain of the Congress of the United States pursuant to Article I, Section 8, paragraph 3, of the Constitution of the United States. The statute here under consideration contravenes that provision.

(4) The police power of the State of Georgia does not extend so far as to justify the regulation of this business to the point of price fixing. It is not a business which affects the *public* morals, the *public* health or safety, or the *general* welfare. It is not a business "affected with a public interest" and "clothed with a public use." In this aspect, the statute contravenes the provisions of the Fourteenth Amendment of the Constitution of the United States.

POINT C (page 108)

The effect of the statute as upheld by the District Court's decree is to take without compensation their properties and deprive each and every one of appellants of their respective properties, including the value of their services rendered to the growers of tobacco, the right to earn a reasonable return on their investments, and their liberty of contract, all without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

POINT D (page 123)

If it be assumed,—only for the purpose of argument of this point, that the tobacco warehouse business is a "public utility," that is, clothed with a public use and affected with a public interest, the statute here under consideration is violative of the Fourteenth Amendment of the Constitution of the United States in that the police power of the State must not be exercised in an unreasonable, arbitrary or capricious manner.

(1) The statute here involved is not a reasonable exercise of the police power toward "ends" that are "legitimate" and within the scope of the Constitution by "means" selected which are "appropriate and plainly adopted to accomplish these legitimate ends."

(2) The effect of the statute is to unreasonably reduce the income of appellants. The evidence shows that the gross income is reduced to an amount exceeding 20% for 1935, and the net income is reduced in excess of 50%, and in some cases the entire net income is taken away.

(3) The enactment of the statute was an arbitrary and capricious exercise of power. It is not shown and the District Court does not find that the charges heretofore in effect were exorbitant and unreasonable, or that the business was carried on in any fraudulent manner. No evils or persistent, palpable frauds are apparent which the enactment of the statute aimed to cure.

(a) The Legislature made no investigation. The appellants' own witnesses testified that no evidence was presented to that body, no investigation made, nor any report submitted. No hearing was had and no witnesses appeared before the Legislature.

(b) The statute, as a rate order, provides for no hearing and merely fixed a hard and fast scale of charges, with no supervising body. It provides only for a criminal penalty if the mandate is not obeyed.

(c) The Act is plainly discriminatory and is class legislation. It is an effort to regulate and control one business, tobacco warehousing, for the profit and benefit of another business, tobacco growing.

V

ARGUMENT

The District Court's Finding Numbered 23 Is Not Supported By the Evidence.

The District Court majority found:

> "23. The fixing of a scale of prices for services rendered by the warehousemen does not burden or interfere with interstate commerce." R. p. 86.

The exclusive power to *regulate* commerce, interstate and foreign, is in the Congress.

This finding cannot be supported as a fact proved by the evidence. It is an ultimate inference or conclusion based on no basic intermediate findings of fact essential to support it. The court expressly finds as a fact: "The type of tobacco grown in Georgia is the 'bright leaf' and is almost exclusively used in the manufacture of cigarettes." (Finding 5.)

Further, in finding 7, it is held that the principal purchasers of the bright leaf tobacco are limited to a few large manufacturers of cigarettes. R. p. 118.

In the fourth conclusion of law the court recognizes that no manufacturer of cigarettes has a factory in the State of Georgia. This fact cannot be contradicted by any evidence in this record and is not denied by appellees.

The witness Holton B. Wallace is the only witness who testified directly on this point, but the correctness of his

testimony has never been questioned and we believe it to be the truth. As Record page 335 he testifies as follows:

> "Practically all the tobacco grown in Georgia is shipped out of the State; I would say about 40% for export, and the remaining 60% of the Georgia belt is shipped to North Carolina or Virginia to be manufactured. There was a small cigarette plant at Hahira, Georgia; I don't know whether they obtained their raw products in Georgia or not. They did not maintain any buyers on our market, but I understand that is no longer operated. Probably some of the 60% that is domestically consumed would go to Louisville, Kentucky, to the Axton-Fisher Company. They have a buyer in Georgia. Then the Export Tobacco Company, which is primarily an export company, have an American subsidiary, Brown and Wilson of Louisville, Kentucky. They no doubt ship some of their purchases to Louisville. With the exception of the Hahira plant I mentioned, and which I understand is out of business, there is no tobacco consumed in Georgia manufacturing which is bought on the warehouse floors of Georgia; none in Georgia that I know of."

The course of business cannot be disputed. At the places of business of these appellants, "buyers" from the cigarette manufacturing "companies" meet and contract sales with the growers of bright leaf tobacco. So soon as the auctioneer cries off a basket of tobacco to a buyer and the grower affirms the sale, the company-purchaser moves that basket directly to railroad cars or trucks, for transportation to other States and foreign countries, in practically every instance. R. pp. 136, 139, 146, 197, 204, 342, 481.

It is common knowledge that the large cigarette manu-

facturers are the only "companies" consuming Georgia-grown tobacco.

American Tobacco Company—"Lucky Strikes."

P. Lorillard Company—"Old Golds."

R. J. Reynolds—"Camels."

Liggett & Myers—"Chesterfields."

Axton-Fisher Company—"Spuds."

Brown & Williamson Company—"Kools."

These companies are located in Louisville, Kentucky, Richmond, Virginia, and various places in North Carolina.

The Export Tobacco Company, the Imperial Tobacco Company, the British American Tobacco Company, and the China American Tobacco Company are among the principal foreign or export companies buying on the Georgia market. R. pp. 191, 204, 414, 536.

A "set" of buyers is never less than eight and not more than twelve, one from each of the above companies and one or two of the smaller companies in some instances. No one of the manufacturers above named has a plant for the manufacture of cigarettes in the State of Georgia.

It is true that "speculators," "pin hookers," and warehousemen purchase some tobacco at the auction sales, but these in turn have no intention, and no other outlet, than to resell it at the earliest possible moment to the above named cigarette manufacturers. From complainants' exhibits 5, 6,

7 and 8, R. pp. 665, 669, it will be seen that this type of sale is insignificant. For instance, in 1935 "dealers sales" were 2,927,731 pounds of tobacoo, "owners or other warehouse sales" 5,026,388 pounds, out of a total firsthand sales of 71,826,532 pounds. An examination of the other exhibits will show the insignificant amount of tobacco not bought in the first instance by these companies.

As a practical matter, every sale of every pound of Georgia-grown tobacco which passes through the warehouses of appellants is destined for interstate or foreign shipment.

On these facts, which cannot be and are not denied, the interstate character of the transactions and business is fixed and determined. *Lemke v. Farmers Grain Co.*, 258 U. S. 50.

Whether there exists a "burden or interference" with this interstate commerce cannot be ultimately inferred with such basic intermediate findings demanded by the evidence and no findings to the contrary made by the District Court.

If the enactment regulates or results in interference with, obstruction to, or a burden on interstate commerce, however slight, it is beyond State power to so regulate.

But here there is a direct burden, interference with and regulation of this business, this instrumentality of commerce. The "rate" of pay for the service is fixed in a business which is interstate commerce.

In the *Minnesota Rate Cases*, 230 U. S. 352, at 396, Chief Justice Hughes, speaking for the Court, said:

"If a State enactment imposes a direct burden upon

interstate commerce, it must fall regardless of Federal legislation. The point of such objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free."

In *Kansas Southern Railway v. Kaw Valley Drainage District*, 233 U. S. 75, Mr. Justice Holmes, at pages 78 and 79, said:

"These judgments must be taken as they read upon their face. They are not conditional orders to raise the bridge if the defendants can obtain the consent of parties not before the court and of one authority at least not subject to its control. They cannot be qualified by speculation as to what is likely to happen in fact. They are out and out orders to remove bridges that are a necessary part of lines of commerce by rail among the States. But that subject-matter is under the exclusive control of Congress and is not one that it has left to the States until there shall be further action on its part. The freedom from interference on the part of the States is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ. . . .

"The decisions also show that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' *Illinois Central R. R. Co. v. Illinois*, 163 U. S. 142, 154. *Austin v. Tennessee*, 179 U. S. 343, 349. *Atlantic Coast Line R. R. Co. v. Wharton*, 207 U. S. 328, 334."

In *Lacoste v. Department of Conservation*, 263 U. S. 545, at page 550, Mr. Justice Butler, speaking for the Court, said:

"This Court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description or characterization given it by the legislature or the courts of the State will not necessarily control. Regard must be had to the substance of the measure rather than its form. *Looney v. Crane Co.*, 245 U. S. 178, 189, et seq.; *Kansas City, etc. Ry. Co. v. Kansas*, supra, 240 U. S. 227, 231; *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 362; *U. S. Express Co. v. Minnesota*, 223 U. S. 335, 346; *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 227."

The attempt of a State by legislative action to prescribe a scale of rates for services in an interstate business has been held many times to be a direct interference with, burden on and regulation of interstate commerce, and is in fact *regulation.*

In *Missouri v. Kansas Gas Co.*, 265 U. S. 298, Mr. Justice Sutherland, speaking for the Court, at page 308, said:

"The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation. See *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 493. With the delivery of the gas to the distributing companies, however, the interstate movement ends. Its subsequent sales and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. *Public Utilities Comm. v. Landon, supra*, (249 U. S. 236, 244-245). In such case the effect on interstate commerce, if there be any, is indirect and incidental. But the sale and delivery here is

an inseparable part of a transaction in interstate commerce—not local but essentially national in character,—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the Commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the State and before it had become part of the general mass of property therein. See *Brown v. Houston*, 114 U. S. 622, 634. There is nothing in *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23, inconsistent with this view."

A further and more detailed discussion of the authorities is made at a later part of this brief.

THE NATURE OF THE TOBACCO WAREHOUSE BUSINESS.

Tobacco warehousing, as this business is called, is not a storage business, R. pp. 147, 471, 478. It is not a warehouse in the commonly accepted use of that word. It has some of the elements of the business of a factor, broker, or commission merchant. With reference to taxation, this has been held in the case of *Cothran and Connally v. United States*, 276 Fed. 48, affirmed by Circuit Court of Appeals (4th), 283 Fed. 973.

There is no exclusive franchise granted by the State of Georgia or any of its political subdivisions to any one of these appellants to operate his business in a particular locality, R. pp. 275, 392, 486, 536, 252.

The business is more like the stock exchanges, the cotton exchanges, and the grain exchanges of this country. (Compare *Chicago Board of Trade v. Olsen*, 262 U. S. 1). The normal and customary method of dealing in tobacco is through a warehouse like those of appellants, but there is no monopoly in the legal sense of the word in the handling of this agricultural product. It is a convenient place for a grower to find a ready and willing buyer.

It is necessarily as private a business as any business can be which deals with a particular class of individuals. It is not public in the sense that it is a place where any member of the public would go to transact his business. The dealings are exclusively between the growers of tobacco and the buyers of tobacco for the consuming tobacco companies; that is, those companies which manufacture cigarettes. It is just as much a private business as the employment agency, the ice business, the theatre ticket broker, the gasoline distributing business.

See:

Adams v. Tanner, 244 U. S. 590;

Ribnik v. McBride, 277 U. S. 351;

New State Ice Co. v. Liebmann, 285 U. S. 262;

Tyson & Bro. v. Banton, 273 U. S. 418;

Williams v. Standard Oil Co., 278 U. S. 235.

This business is not a "public utility." It is not like a fire insurance company, the dairy business, or the banking business. Each of these named businesses deals with the public as a whole. Every home owner or businessman in the State

may require light, heat, water, transportation or power; so likewise each individual, regardless of his station in life or calling, may require fire insurance, milk, and other daily products, and the service of the money lenders or bankers.

This business in its fundamental arrangement is a place for a willing buyer and a willing seller to meet and contract with reference to the sale of a single commodity, tobacco leaves.

There is no authority to limit the number of tobacco warehouses, except the supply of the tobacco and the demand of the growers for the outlets. Any one is at liberty to open a warehouse, provided he can finance the venture and secure skilled employees. R. pp. 275, 392, 486, 536, 252.

This dissenting opinion of Judge Deaver clearly points this out. R. p. 91.

With this clearly shown by the evidence in the record, the District Court made these findings:

THE FINDINGS NUMBERED 13, 20 AND 21
ARE NOT SUPPORTED BY THE EVIDENCE.

> "13. By reason of their control of the warehouses in which tobacco is sold, in the normal and customary course of marketing in Georgia the warehousemen have, unless regulated by law, an unduly coercive control over prices charged the growers for services."

> "20. Among the warehousemen there has been organized what is known as the Tobacco Warehousemen's Association, of which all complainants in this case are

members. There is no warehouseman in the Georgia market not joined in the instant suit. The prosecution of the suit is an organized fight through the Warehousemen's Association. The growers are not eligible for membership in this Association. The Association and the buyers determine the date the market in Georgia opens and substantially determine the date on which it closes. The Association undertakes to deal with such practices as affect the interest of the members thereof and adopts regulatory rules to be observed by such members. A new member is admitted when he becomes identified with the tobacco warehouse business in Georgia and promises to be governed in his charges by the schedule of fees then in effect throughout the State of Georgia as fixed by the Association.

"On page 94 of the minutes of said Association of a meeting of May 8, 1934, the following entry appears:

" 'The Secretary was requested to read letter of President Brown to Mr. J. C. Lanier requesting that no reduction be made in commissions or charges by the Georgia warehousemen for the year 1934 session. After discussion of the matter it was decided that no changes should be made in charges, but that if any were made it would be higher instead of lower.'

"On page 91 of the minutes of the meeting of the Association of June 8, 1936, appears an entry to the effect that the object of the meeting was explained by W. E. Fenner as being

" 'For the consideration of the bill passed by the Georgia legislature fixing warehouse charges, and a committee was appointed to employ attorneys.'

"On page 90 of the minutes of said Association of a called meeting of June 22, 1935, appears an entry as follows:

" 'Motion was made and carried that an additional assessment of $75.00 per warehouse be made, this to be for employment of attorneys (in this case).'

"On page 89 of the minutes of said Association of a meeting of July 11, 1935, appears an entry as follows:

" 'On motion made and carried small warehouses assessed $85.00 and others $125.00 in making up fund for legal expenses (this case).'

"On page 88 of the minutes of said Association of a meeting of July 30, 1935, appears the following:

" 'Upon motion duly made and carried the President was authorized to appoint at least a half dozen members of the Association to attend the Macon hearing (the interlocutory hearing in this case) and be prepared to give any testimony that might be desired by the court.'

" 'The complainants through the Warehousemen's Association and their common agreement as to the fees to be charged by them for services rendered maintain and enjoy a virtual monopoly in the field covered by their operations.' "

"21. The business of tobacco warehousemen as conducted in Georgia in the year 1935 and for some years prior thereto was such as to cause it to be 'affected with a public interest' and 'clothed with a public use.' "

These findings by the District Court are not supported by the evidence and are contrary to the evidence.

The 13th finding above quoted is not a fact proved by this record. The exercise of "an unduly coercive control over prices" is not apparent, and its relevancy in this investigation is doubtful. Every person has an absolute control over

his estimate of the value of his services; the freedom of contract guarantee in the Federal Constitution recognizes this. The evidence shows that no complaint had ever been made as to charges exacted in 1934, or even in the depression years. Every one of appellants testified to this effect. R. pp. 156, 262, 308, 353, 380, 392, 409. See also 547, 550.

The only denial of this fact was by appellees' witnesses, J. W. Swindle, a member of the House of Representatives of Georgia, who sponsored the bill—his testimony begins at page 464,—and J. Henry Gaskins, a member of the State Senate of Georgia, whose testimony begins at 493. None of the other witnesses for appellees,—and there were many growers of tobacco who appeared, testified to any widespread feeling that the charges heretofore made were unreasonable and exorbitant.

Some of appellants testified that the charges varied but the District Court in its finding held them to be insignificant, R. pp. 172, 188, 376.

If this "control" exists, as was found by the District Court, no effort has been made to exert it, except in the year 1927. Compare Record pp. 332, 528.

The 20th finding is irrelevant and immaterial and is not supported by the evidence in this record. R. p. 197. The Tobacco Warehousemen's Association is not named as a complainant in the original bill or any of its amendments. Many of the named complainants in the bill testified that they were members. They also testified that they were members of the Boards of Trade which exist in each market town. R. pp. 380, 406, 527. Their testimony was that the purpose of the

association was for the same purpose that lawyers organized bar associations, and doctors organized their medical associations. In fact, every calling or occupation has its organization for the purpose of furthering that particular line of business. Whether such organizations exist and whether their purposes are lawful is not the object of this investigation. If the Tobacco Warehousemen's Association is not a proper one, it should be investigated by the proper authorities in a different sort of proceeding from this one. The District Court quotes from minutes of the meetings of the Association. The first quotation in part is from the meeting of May 8, 1934. The entire minutes are found at Record p. 651 and it is apparent from a reading of those minutes that in that year all industry in the United States was organized and organizing under the National Recovery Acts. Many of appellants testified to this. R. pp. 189, 256. The Mr. J. C. Lanier mentioned in those minutes was the Code Administrator for the Tobacco Warehousemen's Code Authority. R. p. 193. This code fixed the charges uniformly at the same scale as was generally charged in Georgia prior to 1934, R. p. 278.

Mr. W. E. Fenner testified that he was on the Code Administration, R. pp. 278, 286, 307; that no objection was raised to the scale as prescribed for Georgia and it was maintained even though the scales for North Carolina and South Carolina were lower. The Code Authority recognized the higher cost of operations in Georgia and the difference in operating conditions there, R. 307.

The statement that a new member is admitted when he becomes identified with the tobacco warehouse business in Georgia and promises to be governed in his charges by the schedule of fees then in effect throughout the State of Geor-

gia as fixed by the association is denied by every witness for appellants, except Holton B. Wallace, R. p. 325. His testimony was only as to himself and on his own statement it is heresay. His operations were confined to one market, Moultrie, Georgia. The testimony of every other warehouseman conflicts with his statement that an agreement to a scale of charges was exacted by the association before a member was admitted. R. pp. 139, 157, 187, 189, 225, 233, 254, 279, 287, 294, 304, 384.

The Warehouse Association does not control the charges made by the appellants, that is, its members in so far as they are appellants in this record. R. pp. 376, 392, 438.

The finding that the business is a "virtual monopoly" and finding 21 that it is a business "affected with a public interest" and "clothed with a public use" is not supported by the evidence and is an ultimate conclusion without basic intermediate findings necessary to support it.

There is no "Anti-Trust" statute in Georgia and there is no constitutional provision making warehouses generally any sort of "public business." The only "Anti-Trust" statute ever on the Georgia statute books was passed in 1896,—Georgia Laws 1896, page 68. This Act was held unconstitutional by the Supreme Court of Georgia in the case of *Brown & Allen v. Jacobs' Pharmacy Co.*, 115 Ga. 429.

As has heretofore been pointed out, the State of Georgia issues no franchise to any one of appellants nor does any subordinate governmental agency. Any one may open and operate a tobacco warehouse. The District Court in its 8th finding recognizes this fact when the specific fact is found

that the number of warehouses and number of market towns have varied from year to year in this State.

Judge Deaver in his dissenting opinion clearly points out that no monopoly can or does exist under the facts in this record. R. p. 90.

The word "monopoly" is derived from the Greek words meaning "alone to sell." It has two concepts—a factual basis and a legal basis. The more common in fact is the geographic monopoly—the wharf owner or ferryman. In the *Munn* case we find what the court there calls a "virtual monopoly", to exist because of the geographic location of the grain elevators; that is, on a narrow strip of land between the lakeside and the railroads.

The factual monopoly immediately and logically leads to the legal concept; that is, a grant or privilege to one person from the sovereign—a franchise, patent or copyright. Monopoly in fact or by law is not of itself objectionable unless it is abused to the point of extortion and fraud.

Here we have no monopoly in fact or law. The warehouses have no natural situation to the exclusion of competitors. Neither the State nor any political subdivision thereof grants an exclusive license or privilege. R. pp. 275, 252, 392, 486, 536. There is no patent on the manner of conducting the business. The undisputed testimony is that any person who chooses may open and operate a warehouse. Membership in the association is no condition precedent. The business has no trade secrets. There is no issue in this case of an illegal combination in restraint of trade under the Anti-Trust Laws, if any. Compare *Sugar Institute v. United States*, 297 U. S. 553.

Charges of monopoly were made, but held to be of no significance in *Williams v. Standard Oil Co.*, 278 U. S. 235. See also *Pacific States Co. v. White*, 296 U. S. at 183.

Whether a business is "affected with a public interest" or "clothed with a public use" is rather a conclusion of law on the facts of each case which show the nature and method of carrying on the business. The nature of this business and the method by which it is carried on are clearly brought out in this record and have been discussed hereinbefore. The legal conclusion we will take up in a discussion of the authorities hereinafter. Page 90-post.

The Findings Numbered 16, 17, 18, 19 and 22 Are Not Supported By the Evidence.

The findings of the District Court with reference to the scale of charges and its effect on the revenues of appellants disregard uncontradicted evidence in the record. They are:

> "10. Beginning with the tobacco selling season of 1927, all warehousemen operating warehouses in Georgia have uniformly maintained, and exacted from sellers, a hard and fast schedule of charges for their services in handling and selling leaf tobacco. There may have been some insignificant exceptions but they were so insignificant as to be immaterial. The schedule of charges so exacted and which was in effect at the time the Georgia tobacco warehouse Act was passed in March, 1935, was based upon three elements, the sale value of tobacco, the number of piles handled, and the weight of the quantity sold, and was as follows:
>
> Commissions: Two and one-half per cent (2½%);
>
> Auction Fees: Twenty-five cents per pile up to and

including 200 pounds; fifty cents per pile above 200 pounds;

Weighing and Handling: Twenty-five cents per pile up to 100 pounds; twenty-five cents for each additional 100 pounds.

"Prior to 1927 the tobacco warehousemen in Georgia for many years, if not from the beginning of the industry, had maintained and exacted from sellers of tobacco a uniform schedule of charges substantially, if not identically, the same as the schedule fixed by the Act of 1935 the validity of which is now being challenged by complainants."

"17. The propriety of charging materially or more for handling tobacco in Georgia than in the Carolinas is not established."

"18. It is not established that the Act attacked was passed without any knowledge on the part of the legislature as to actual conditions under which the business was, and is, being carried on in Georgia."

"19. It is not proven what each or any warehouseman, individual or corporate, lost in revenue by reason of the scale of charges prescribed by the Act attacked. It is not denied that some warehousemen earned a satisfactory profit. It is not proven that in instances where a loss occurred such loss was not due to excessive competition, ill advised loans, unnecessary expenses in buying influence or hauling customers' tobacco or other causes than the reduction in charges. The testimony as to the effects of the Act attacked is as to the group of warehousemen who are complainants, rather than to the effect on each one, and even then it is not proven that all the losses are traceable to the reduction in charges rather than to other causes."

"22. The scale of charges prescribed by the said

Georgia Act of 1935 is not unreasonable, arbitrary and capricious and is reasonably adapted to accomplish the desired results."

These findings are discussed together in that they deal primarily with the scale of charges heretofore made by the warehousemen for their services and the scale prescribed by the statute now under attack.

We point out that none of these findings by the District Court are to the effect that the charges in effect prior to the passage of the Act were unreasonable or exorbitant. The finding of the District Court is merely that the statutory scale is not unreasonable, arbitrary and capricious. Without the basic intermediate finding as to the pre-existing charges we submit that the ultimate conclusion of the court cannot stand.

The 10th finding, in so far as it finds that prior to 1927 there had been a uniform schedule of charges on the same schedule as fixed by the statute, has no evidence to support it in this record.

Many of appellants testied that the charges made in 1934 had been substantially the scale since they had operated in Georgia. The explanation given of how the Georgia scale was arrived at is significant.

Mr. Saunders at Record page 135 testified as follows:

"When I first went there (to Georgia) the warehouse charges were the same as they are now and have always been the same so far as I know, no changes that I have ever known of. The Warehousemen's Association never passed any resolution fixing the warehouse charges in Georgia that I know of. They were using the South

Carolina charges the same as they did last year and they were using them when I first went there so far as I know. The warehousemen haven't maintained the same charges by agreement."

Mr. Smith testified at Record page 172 as follows:

"I have been charging in my warehouse at Valdosta the same warehouse charges ever since I have been in Georgia; I think I have ever since I started in 1919; I won't be certain about that."

Mr. Brown testified at Record page 178:

"For the last fifteen years I have operated in Georgia. The schedule of charges in effect in Georgia have been practically the same that we used last year, except probably in 1921 or 1922 when our charges were different from other charges in the State at least for different types. I mean they were at least different from the Tifton charges."

And again at Record page 188 he explains the difference in charges as far back as 1922, as follows:

"In 1922 I had a schedule of charges and my bookkeeper told me it was different from Tifton and I immediately came up to the level of Tifton. . . . My bookkeeper I think he probably had the Kentucky charges in mind because he worked there and they were put in because I did not pay any attention to it. After operating two or three years he told me he had been talking to the bookkeeper in the warehouse at Tifton and said our charges were different from Tifton. . . . I can't swear that since 1922 every warehouse in South Georgia has been charging the same auction fees and weighing and handling fees and commissions on sales. So far as I know it is true."

See also R. pp. 225, 233, 253, 259, 279, 288, 340, 347, 362, 376, 406, 438.

The cost of operating a tobacco warehouse in Georgia under the facts in this record is clearly shown to be higher than in any other tobacco producing State. The District Court's finding numbered 17 to the contrary has no support from the evidence in this record. It is contrary to other findings and has no basic intermediate findings to support it, and is contrary to the other findings of the court. See page 10 supra.

The Operating Conditions and Circumstances of the Business in Georgia are Substantially Different from other Tobacco Producing States.

Each witness testified that the conditions and circumstances surrounding the tobacco warehouse business, that is, the business of auctioning leaf tobacco in the State of Georgia, are substantially different from those surrounding the same business in those States where tobacco growing has been carried on for generations, to-wit, North Carolina, Kentucky, and Virginia. The first few witnesses for appellants testified as to the conditions in Georgia, as well as the conditions in other sections they operated in. Mr. Saunders operated in Georgia and North Carolina, R. p. 113; Mr. Smith in Georgia and Kentucky, R. p. 170; Mr. Brown in Georgia and Virginia, R. p. 177; Mr. W. W. Bernard and Mr. Park Bernard in Georgia and Tennessee, R. pp. 339, 373. Mr. W. E. Fenner operated in three States, Georgia, North Carolina and Kentucky, R. p. 269. The remaining witnesses in large part substantiated the testimony of these witnesses.

The most pronounced difference is that the tobacco buying companies only allot a short time for buying in the State of Georgia. R. pp. 116, 130, 174, 194, 226, 234, 349. The average production and price is much less than in North Carolina and South Carolina. R. pp. 591, 665, et seq. (Complainants' exhibits 4 to 8, inclusive.) Naturally the tobacco ripens in Georgia earlier than in other sections. Generally the season commences in Georgia around the first of August and continues until the crop is sold, which is not less than two weeks and not more than six weeks. R. pp. 116, 132, 243, 345, 347. The next season chronologically is South Carolina, which commences perhaps a week or ten days later in Georgia and continues for some time longer. Next is the Eastern North Carolina season; then the old belt in North Carolina; the Virginia season; the Kentucky season; Western North Carolina and Tennessee seasons. North Carolina and Virginia are the oldest States producing leaf tobacco and consequently the seasons there are longer than anywhere else. R. pp. 114, 116, 133, 195.

The opening of the markets is determined by the buyers of tobacco primarily. The closing of the season is determined by the buyers and the warehousemen, who agree as to when the time has arrived, after which little or no tobacco can be sold in a community. R. pp. 130, 133, 196, 479, 484, 487.

Prior to 1917 Georgia was essentially a cotton producing State. The scourge of the boll weevil made it necessary to plant a new "money crop." Tobacco growing was encouraged. The Georgia farmers had no experience in this new crop, consequently many families moved into Georgia from

the North Carolina section. A new industry began about this time. There were no native farmers of this State familiar with the planting, cultivating, harvesting, curing and marketing of tobacco. R. pp. 195, 464, 494, 584, 587. There is in Georgia no manufactory which consumes the tobacco produced in this State. It is all bought and shipped out of the State in interstate and foreign commerce. R. p. 335.

The climate in Georgia is more variable from year to year than that of North Carolina and other older tobacco producing areas, as is shown by the fluctuation in production and prices. R. pp. 241, 583. The hot sun of South Georgia in August makes the working conditions in a low large-roofed building very uncomfortable. The hours of labor are long; in many cases three shifts of common labor are employed in twenty-four hours. R. pp. 116, 175. Disease more frequently attacks the plants, which are susceptible not only to disease but to climatic conditions to a very great extent. R. pp. 235, 250, 285, 583.

All of appellants are non-residents of the State of Georgia, with perhaps four or five exceptions. Tobacco warehousemen should not only know how to plant, cultivate and cure tobacco, but must be expert in the grading of it. This skilled group of operators is necessarily from the areas which have produced tobacco for generations. Knowledge of grading is attained only by experience. R. pp. 126, 238. A substantial number of the employees of a tobacco warehouse are trained and skilled men, particularly the auctioneers and assistant sales managers, the persons weighing tobacco, the persons figuring the gross sales of tobacco, called clip and book men. These are all in most cases imported to the Georgia markets. R. pp. 122, 171, 200.

Due to the shortness of the season and the belief among the Georgia growers of tobacco that the first sales bring the highest prices, the crop in Georgia is "rushed" to the markets as soon as the season opens. The rush is on the part of the growers in an effort to have their tobacco sold at the first opportunity. R. pp. 115, 132, 467. This consequently taxes the organization of the warehousemen to the limit and makes for expensive operation. The necessary effect is that all tobacco produced is rapidly sold and the season is short because of this fact. The warehouse cannot close and will not close until all tobacco is sold. If the tobacco is sold at a rapid rate the duration of the season is correspondingly short. A great number of common unskilled laborers is necessary to handle the tobacco, working twenty-four hours a day for five days in the week the larger part of the season. R. pp. 115, 226.

A tobacco warehouse in Georgia is used for very little else during the year. The investment is large. The deterioration and depreciation is rapid, and consequently rents are high where the property is owned by others than the operators. The investment must yield in a short period of time a fair return where the operators own the property. No other commodity raised in Georgia requires the large area of floor space as does a leaf tobacco auction sale. R. pp. 176, 511.

In Georgia there is no practice or regulation requiring the "tying and bundling" of tobacco. This is a practice indulged in in every other tobacco growing area. Georgia is the only State where leaf tobacco is sold "loose." R. pp. 131, 196, 360, 425. In South Carolina this tying and bundling is required by statute (Code of 1932, § 7203). Tying and bundling is accomplished by the grower, who selects from ten

to twenty leaves of tobacco and ties the stems together, making a small bundle. This adds to the attractiveness in display of the tobacco, prevents waste or damage on the floor, and by this process the grading is more carefully done. The greater number of grades a grower displays, the greater the number of piles, and generally the higher the price received for each pile. R. p. 284. The Georgia growers are not as experienced in grading as in other areas, and selling their leaf loose, their piles average much more in weight. The price received is naturally based on the lowest grade of tobacco in that pile.

It would seem apparent that if the custom of statutory requirement of tying and bundling tobacco was in effect in Georgia it would take considerably more time on the grower's part properly to prepare his crop for market. Consequently it would prevent the rushing of the crop to market and the selling season would be longer. Many witnesses testified that in North Carolina and other States the growers preferred to arrange their tobacco in the baskets and unload their own crops, and the warehouseman necessarily employs less unskilled labor in those States than in Georgia. R. pp. 116, 175, 226. In Georgia the contrary is true. From laziness, inexperience or some other cause the growers bring their tobacco to the warehouse and never touch it or have anything to do with it except to get their checks from the warehousemen. R. p. 116.

It is also true that in Georgia the common labor employed in a warehouse is not so efficient as can be found in other tobacco producing areas. The season is short and the opportunity for training labor is consequently less. In other sections where the seasons last longer, common labor has more

opportunity to become trained and efficient and generally is employed from year to year. R. p. 353.

Due to the comparatively short term that tobacco has been grown in commercial quantities in Georgia, the Growers' experience in various phases of planting, cultivating, harvesting and curing tobacco is limited. The solicitation of a grower's business consequently demands a man fully informed in these fields, because he is frequently called upon to advise with the growers with reference to this. While no charge is made by the solicitor for such advice as he may give, his effectiveness in securing business depends on his knowledge and advice to these growers. R. pp. 117, 235, 239. It is to the warehouseman's interest that the growers grade their tobacco properly, and in soliciting business the warehouseman frequently advises the grower and urges him to grade his leaves as closely as possible. R. p. 139.

Due to the fact that skilled labor must be employed from outside of the State, the warehouseman, in order to secure an efficient force, must contract months in advance for his auctioneer, his clip man, his book man, his weigh man, his assistant sales manager, his bookkeeper, and other skilled employees. R. pp. 181, 240. He must estimate the crop in Georgia early in the season and make his commitments without knowing exactly the volume of business he will have or the quality of the tobacco to be offered for sale. These contracts become a fixed charge in the business, and necessarily the wages paid are high because of the fact that this skilled non-resident labor must be paid transportation expense as well as living expenses away from their homes. R. pp. 121, 240.

All witnesses for appellants have testified that banking facilities are more expensive in Georgia than elsewhere. Most of the working capital is borrowed money and the interest rate, without exception, is 8%, while in other places it is never higher than 6%. The banks in Georgia also charge one-fourth of one per cent, that is, $2.50 per thousand dollars, on funds handled through the warehouseman's account. In other sections the exchange rarely exceeds one-tenth or one-eighth of one per cent. In this respect the interest rates are one-third higher and the exchange rates are double. R. pp. 128, 227, 244.

The warehousemen and solicitors begin their work in Georgia soon after the first of each year. They remain in Georgia, or make frequent trips there from their homes, until the first of June. All of them are in the Georgia fields by June 1st, calling on growers and giving what assistance they can with reference to planting, cultivating, harvesting and curing the tobacco. Solicitation through field men, solicitors or drummers is the commonly accepted practice of getting business. Many of the witnesses for appellees testified to this effect. R. p. 227. These field men, when the season actually opens, come into the warehouse and are employed as floor men. They know the growers personally and see that each one is properly looked after when his crop is brought to the warehouse door; they know the common labor and are best able to supervise their work. R. p. 117.

The Value of Properties and Service Devoted to This Business.

The warehouse buildings used for tobacco sales in Georgia are specially constructed for this purpose. Generally they are

wooden frame, a large substantial floor, with galvanized iron sheeting sides, a similar roof or one made of asphalt or asbestos composition. Many windows are required in the sides of the buildings, as well as sky lights in the roof, as good light is necessary for inspecting and grading the tobacco. R. pp. 122, 178.

The area of floor space varies from 15,000 square feet to 60,000 square feet under one roof.

The cost of construction varies according to the type of building, but the upkeep, repairs and depreciation are high. R. pp. 123, 509.

Of the forty-seven warehouses operated in 1935 the following were owned by the operators, and represent the investment:

	Investment	
B. B. Saunders, Valdosta	$38,000.00	R. pp. 123, 127
Waycross Tobacco Warehouse, Waycross	29,387.25	R. p. 208
Growers Warehouse, Douglas	34,500.00	R. p. 223
Vann's Warehouse, Vidalia	58,000.00	R. p. 341
Farmers Warehouse, Hazlehurst	6,000.00	R. p. 352
Planters Warehouse, Hazlehurst	9,000.00	R. p. 352
O. K. Warehouse, Douglas	24,200.00	R. p. 367

Vidalia Tobacco Warehouse, Vidalia	74,000.00	R. p. 380
Hahira Warehouse, Hahira	5,000.00	R. p. 385
Twin Brick Warehouse, Tifton	80,562.52	R. p. 397
Farmers Independent Warehouse, Hahira	14,000.00	R. p. 403
Red Warehouse, Douglas	36,000.00	R. p. 407
Farmers Warehouse, Tifton	36,386.90	R. p. 410
Banner Warehouse, Tifton	42,493.00	R. p. 443

This information is also shown in complainants' exhibit No. 11 (9 and 10). R. pp. 701, 702.

The Hahira warehouse above mentioned is built on rented ground. R. p. 385.

The remaining warehouses are owned by local persons or corporations and rented to the operators. The terms of the rental contracts vary. Some are for a term of years at a flat rate; others are on a percentage or poundage basis, that is, the rent is fixed according to the number of pounds of tobacco sold. R. pp. 149, 176, 177, 344. Generally the charge is a dollar to a dollar and a half per thousand pounds of tobacco sold. The flat rate of rental roughly approximates 10% per year of the cost of the building and equipment. R. pp. 123, 261, 373, 344.

In all cases there is no income, as a practical matter, from the building except the rent paid during the tobacco season. Investment must yield within the selling season a return for the full twelve months of the year.

A large number of employees are used. Mr. Saunders estimated that in all he used one hundred men. The small warehouse required fifteen to twenty employees.

Tobacco warehousing is a skilled occupation. It requires large sums of money in that the operations must be financed to the extent that the warehouseman can issue checks to pay for every pound of tobacco sold in his warehouse in one day. As much as $125,000.00 is paid out in one day in some of the warehouses. R. pp. 143, 149. The business is one of great hazard. The warehouseman is the one protection between the farmer and the consumer of the tobacco, that is, the buyers from the tobacco companies. If the warehouseman does not know the grades of tobacco and open the bidding at a price reasonably commensurate with the grade of tobacco, he will not get the highest prices and, therefore, will eventually lose his patronage. If the warehouseman overbids, he is left with a lot of tobacco on hand in his leaf account and generally sustains a loss in the resale thereof. R. pp. 124, 190, 228. The witness Saunders described this duty and responsibility at Record pp. 118, 124, 146. His testimony is similar to expressions from every warehouseman who testified.

The Effect of the Statute on Appellants' Revenues.

The District Court finds as a fact that the record does not prove what each or any warehouseman, individual or corporate, lost in revenue by reason of the scale of charges prescribed by the Act here under consideration. This finding is indefensible. At Record page 592 it was stipulated that the list of warehouses depositing in the registry of the District Court and the amount of the deposit of each was correct. These deposits are the difference in the revenue received under the old scale of charges and the statutory scale. For the season 1935 it amounted to a total of $115,920.90. Each warehouseman testified as to his operations at least for the year 1935 and gave as a fact the loss in revenue caused by the reduction in charges. R. pp. 150, 156, 259, 355.

A general picture of the income, expenses and earnings of these appellants can best be obtained from complainants' exhibits 10 to 15, inclusive. R. pp. 671-706.

Appellants' witness Gardner compiled these exhibits and testified at Record p. 453. Many of appellants did not operate prior to 1935 or operated in different warehouses, but for the season 1935 these exhibits show conclusively the effect of this statute on the revenues of appellants.

Complainants' exhibit No. 10 (1-4) R. pp. 673-676, reflects the testimony concerning only twenty-seven warehouses which were operated by some of appellants in the 1931 season. The production in that year was over sixty million pounds of tobacco, but the price average only 6.41 cents per pound, the lowest average ever raised in Georgia. (Defend-

ants' exhibit No. 6, R. p. 654.) That exhibit shows a combined net income of $43,399.04. See also complainants' exhibit No. 13, R. p. 705. This does not reflect any allowance in the expenses of a salary to the operators of the businesses for their personal services or any depreciation or return on their investments. It averages less than $2,000.00 income per warehouse for 1931.

Exhibit 10 (5-7) R. pp. 677-680, shows twenty-five warehouses operating in 1932. The combined net result is a loss of $14,573.35. The crop was only twelve million pounds, due to a disastrous disease called the "Blue Mold" which attacked the plants in the seed beds. The price average was only 10.41 cents per pound. The average loss per warehouse operating was $500.00, without any expenses included for salaries, depreciation, or return on investment.

Exhibit No. 10 (8-12), R. pp. 681-684, shows twenty-nine warehouses operating in 1933. The total earnings, before deductions for salaries to the operators, depreciation, or return on investment, were $104,304.01. This divided among the warehouses shows an average income of $3,600.00 for that year. The yield was sixty million pounds and the average price 11.30 cents per pound.

Exhibit No. 10 (13-16), R. pp. 685-688, reflects the 1934 operations of thirty-three warehouses. The combined earnings, without deductions for salaries, depreciation, return on investment, amounted to $89,317.95, or an average of $2,700.00 per warehouse. The yield in 1934, which was the first year of Federal crop restriction, was only thirty-three and one-half million pounds, but the price averaged 18.73 cents per pound.

Exhibit No. 10 (17-20), R. pp. 689-692, gives a complete picture of the 1935 operations. The exhibit analyzes only forty-five of the forty-seven warehouses, as Mr. Gardner, the witness, did not have before him the testimony of Mr. H. B. Wallace. R. p. 318. The combined income, excluding Mr. Wallace's warehouse, was $246,438.98, the best year as to volume of the crop and average price in the last six years. R. pp. 202, 584. The average income divided among the warehouses was $5,600.00, without deduction for salaries, depreciation or return on investment. The production was seventy-two million pounds and the average price was 18.91 cents per pound, the highest average in eight years.

The average earnings, therefore, of each warehouse analyzed for the last five years is only $2,600.00, to be divided, in every instance practically, between at least two partners, in some instances more, and this without deduction or charge against the earnings for the time, skill and experience of the operator, depreciation on equipment or property or return on investment.

Mr. Gardner's study or analysis of these warehouses for the period 1931 to 1935 in detail is in the record as complainants' exhibit No. 11, R. pp. 693-702, two sheets for each year. The tonnage each warehouse sold is given and the value of the tobacco sold is stated. See complainants' exhibits 4, 5, 6, 7 and 8, R. pp. 665-669.

The returns for this arduous and hazardous business are not large and they are a variable figure from year to year. The reward depends on the poundage sold in each warehouse, as well as the price of tobacco. The quantity or quality of

the crop cannot be controlled effectively. R. pp. 583, 260, 280.

The commissions, auction fees and weighing fees constitute the main income to a warehouse. The only other source of income available is from the "leaf account." This account represents the purchase of tobacco on auction by the warehouseman in his effort to keep the buyers bidding in line with the grade of tobacco offered for sale. Normally the resale of such purchased tobacco is at a loss if the warehouse is not extremely fortunate. It is one of the hazards of the business. He must continually "push" the price, and often as the season progresses the price declines as the buyers fill the quotas allotted to them by their companies. R. pp. 118, 126, 190, 228.

Through this "leaf account" most operators clear their sales of "scrap" or "waste tobacco" — "sweepings." In Georgia the tobacco is sold "loose leaf," consequently much of it falls off the baskets and is stepped on or otherwise damaged. This waste or sweepings has a market value, but the amount received for it is credited to the leaf account to offset the customary loss there. R. pp. 126, 191, 204. This is not a profit to the warehouse, as the grower is paid on the initial weight of his tobacco when it is first brought to the warehouse. The grower does not suffer one cent. R. pp. 203, 315. The warehouseman frequently is charged for this loss in weight by the tobacco company if any serious shortage appears. R. pp. 256, 265, 315.

The Evidence Shows That the Statutory Schedule of Charges, If Put Into Effect, Is so Unreasonable as to Approach Confiscation of Appellants' Businesses.

The actual investment in tobacco warehouses in Georgia totals a large sum. The warehouses of appellants, owned by them, represent an investment of approximately $500,000.00. If the value of the rented warehouses is capitalized at 10%, they amount to in excess of $1,000,000.00. The equipment required is of a kind that can only be used in the tobacco warehouse business, and represents a substantial investment. The net income under the statutory charges for 1935, $130,624.62, (complainants' exhibit 13, R. p. 705) and on the amount invested in warehouses alone the return is less than 10% for the best season in Georgia. The amount of cash capital required to finance each season's sales is enormous. The various operators have testified to the amount of cash required and the amount of their borrowings from the banks and individuals. One witness testified that he incurred liabilities for a season's financing in excess of $140,000.00, although probably $50,000.00 represents the average borrowings per season. No single operator is able to finance his business. Credit is a vital element.

Before the actual return on the amount invested can be figured it is necessary to determine the fair expense allocable to the salary of a warehouseman for running the business, for his time, skill and experience in the actual carrying on of a tobacco auction. Fortunately some of these operations are so conducted as to reflect plainly what is actually being paid for this personal service.

At Blackshear, Georgia, in the Brantley Warehouse, R. p. 418, it is testified that Mr. Brantley owned the building and financed the operations for the 1934 and 1935 season. Mr. Sanford, the witness, supplied the skill and experience. In 1934 Mr. Sanford received one-fourth of a net profit of $1,528.12 for his services. In 1935 his earnings were one-half of $5,248.08 on the basis of the old scale of charges and one-half of $2,680.25 on the basis of the statutory scale.

At Tifton there are two warehouses operated by a corporation, the Tifton Investment Company. They are the Farmers Warehouse and the Twin Brick Warehouse. R. pp. 395, 410. Of necessity the corporation hires experienced warehousemen to conduct the operations. These men are from Virginia and North Carolina and work on a salary plus a commission, with no responsibility for losses.

Mr. A. W. Jeffreys operated the Farmers Warehouse, R. p. 410. (Complainants' exhibit No. 3, R. p. 614.) He testified that his salary was $1,500.00 per season plus commissions of 7½ cents on each hundred pounds of tobacco sold. He further testified that he received the following amounts:

1935 season	$2,996.64
1934 season	3,122.46
1933 season	3,500.00
1932 season	1,107.45
1931 season	2,996.97
1930 season	3,851.53

(R. pp. 616-622.)

Mr. W. W. Winstead testified that he ran the sale in the Twin Brick Warehouse, R. p. 395 (complainants' exhibit

No. 2, R. p. 605). His salary was likewise $1,500.00, with a similar commission. His earnings were:

1935 season	$3,000.00
1934 season	3,122.46
1933 season	3,500.00
1932 season	1,107.45
1931 season	3,932.67
1930 season	4,479.74

(R. pp. 608-673)

These figures are actual outlays by successful managements for the time, skill and experience of a tobacco warehouseman. The Tifton Investment Company is one of the largest tobacco warehouse operators in Georgia.

It is apparent from the testimony of these two witnesses that the Tifton Investment Company's investment in the two properties, amounting to $116,949.42, (complainants' exhibits 2 and 3, R. pp. 605 and 614) has in the last six seasons obtained a return on their investment of less than 5% per season. If the witness Gardner's studies of this business are correct (complainants' exhibits 10-15, R. pp. 671-706), the reduction in income for the six-year period would average more than 20% under the new scale of charges prescribed by the Act. This would reduce the Tifton Investment Company's return to less than 4% per year on their investment.

From the evidence in this record we believe that an amount fairly representing a salary to the warehouseman operating a business can best be stated in terms of the poundage sold. We believe that it can be fairly said that $1,000.00 per million pounds of tobacco sold is a minimum salary for an ex-

perienced warehouseman. R. pp. 127, 182, 347, 358, 276. If a corresponding expense item were charged against the earnings testified to by the warehousemen, their earnings would be substantially decreased from the figures stated in this record. Compare Saunders' testimony, R. p, 154, Lyddane's testimony, R. p. 209, Strickland's testimony, R. p. 242.

The effect of the statute on appellants' businesses is vividly shown in the additional studies made by the witness Gardner. (Complainants' exhibits 12, 13 and 14), R. pp. 703-706.

Exhibit 12, R. p. 703, gives twenty-six warehousemen's testimony, reflecting their 1935 operations. The number of pounds sold in each warehouse is stated; the value of the tobacco sold is also given; next is the amount testified to as the total income from all charges, including commissions, auction and weighing fees; next is a computation of the commission, that is, 2½% of the value of the tobacco sold, as shown in column 2. This figure deducted from the total commissions, column 3, gives the amount necessarily collected as weighing and auction fees, column 4. The last figure, column 5, is the amount deposited with the court, which is the difference between the weighing and auction fees charged under the old scale, and those provided for in the scale contained in the Act of the Legislature here under consideration.

The total number of pounds sold by the warehouses whose operations are testified to, divided into the total sum of the amounts in column 5, gives a reduction of $1.54927 per thousand pounds of tobacco sold. (Complainants' exhibit No. 12), R. p. 703.

A figure not so exact may be obtained by dividing the total Georgia production, first hand and dealers' sales, 74,-

754,083 pounds (complainants' exhibit No. 8) R. p. 669, into the total amount on deposit with the court, $115,920.90. R. p. 593. The result of this division gives a reduction per 1,000 pounds of $1.5506. This is also a check on Mr. Gardner's figure.

Complainants' exhibit No. 13, R. p. 705, is a compilation of the figures from the preceding exhibits 10 to 12, inclusive, together with the application of the figures in column 6 of the exhibit derived from the computation shown in exhibit 14 hereinafter discussed. This exhibit No. 13 presents the effect of the reduction provided for in the statutory scale on the income or charges of the warehouse in the previous years, to-wit, 1931 to 1935, inclusive.

Complainants' exhibit No. 14, R. p. 706, is a computation to determine the effect of the statutory reduction on income for the preceding years, 1931 to 1935, using as a basis the $1.54927 per thousand pounds sold. Column 1 is the tonnage for each year, the total of first hand and dealers' sales. (Complainants' exhibits Nos. 4, 5, 6, 7 and 8) R. pp. 665-669. Column 2 is the value of the crops. (Complainants' exhibits Nos. 4, 5, 6, 7, and 8.) Column 3 states the 2½% commission figures on the valuation expressed in column 2, and weighing and auction fees. Column 4 is the total fees or income for each year, being the sum of the two items in column 3. Column 5 is the effect on weighing and auction fees by reason of a reduction of $1.54927 per thousand pounds of tobacco sold. Column 6 is this reduction expressed in percentage. The exhibit shows that the average reduction in gross income to the warehousemen testifying, over the period from 1931 to 1935, inclusive, is approximately 20%. This study should be compared with the amounts on deposit with

the court, R. p. 592, for each warehouse, and the exhibit 10 (17-20) R. pp. 689-692. From examination of these figures it will be seen that a 50% reduction in net income is brought about by the statutory scale of charges. An interesting check on the witness Gardner's accuracy is shown by the figure for 1935 in exhibit 14, column 5, R. p. 705. His computation shows that the difference in charges amounted to $115,-814.36, while the clerk's report of the amount actually on deposit, R. p. 592, is $115,920.90.

Complainants' exhibit No. 15, R. p. 706, emphasizes the tremendous effect that the price per pound of tobacco has on the warehouse earnings. The witness Gardner, R. p. 457, testified that had the average price for tobacco during the 1935 season been the average price for the last twelve years, 14.90 cents per hundred, the reduction in commissions alone would have been $71,826.35. The average price for the past six years has been only 12.27 cents per pound and the average price for the entire time tobacco has been grown in Georgia commercially, eighteen years, is only 15.91 cents per pound. R. p. 457.

The apparent and undeniable fact is that the reduction in earnings of appellants made by the statutory scale is on its face unreasonable, arbitrary and capricious. Each of the appellants who testified stated that had the same scale of charges been in force for the preceding years their losses would have been tremendous. They further testified that should this scale apply in Georgia most of them would be compelled to go out of business. Mr. Saunders, at R. p. 156, expressed it as follows:

> "I don't know whether there is any warehouse in Georgia that sold more poundage this year than mine.

. . . I am positive that maybe with the exception of one year I have led for seven or eight years. The charges that we have charged up until this year have in my opinion been as little as a man could stay in business in Georgia on and charge. If we had to charge any less than that I think you could bid us all farewell because you can't operate and do it. When one takes a period of five years and goes back he will see."

Mr. W. E. Fenner, at R. p. 279, testified:

"From my experience as a warehouseman in Georgia, Kentucky and North Carolina I think the scale of charges heretofore charged in Georgia is reasonable. In my operations in Georgia for 1935 the difference in amount of money between the old charges and the charges passed by the Act of the Georgia Legislature is $4,296.98. I think that amount figures around 18% of my gross income, or something like that. I would not say positively. The net income there shows that it would be practically one-half. . . . If the scale of charges passed by the Legislature had been charged by me in the years previous to the year 1935, I think instead of showing a profit each year I would in all probability have shown a loss or certainly would have had a small profit, if any at all."

Mr. Pruitt, at R. p. 358, testified to the same effect.

Defendants' own witness, R. E. Currin, at R. p. 335, on cross examination testified:

"From my observation, the forty-four warehouses in Georgia operating for the last year or two have not made any money under the present charges. They could not make money under the scale passed by the Legislature. I would not have a house here."

Mr. Currin was formerly in the warehouse business until he met with financial reverses.

THE GENERAL ASSEMBLY OF GEORGIA IS WITHOUT POWER TO ENACT THE STATUTE

The Transactions Regulated Are in, and the Business Is an Instrumentality of, Interstate and Foreign Commerce.

The course of business as carried on by these appellants in Georgia fixes and determines the interstate and foreign character of the transactions.

The concept of interstate and foreign commerce has been one of constant growth as the commerce of this country has expanded. The exclusive control of such commerce by the Congress of the United States has always been upheld where the impact of State regulatory statutes directly affects this subject.

The evidence in this cause shows, without contradiction, that all the tobacco sold in appellants' warehouses is sold and sent out of the State of Georgia in interstate and foreign commerce to be manufactured into finished products, cigarettes, and the finished products sold to the public. The evidence shows, without contradiction, that there is no cigarette manufactory in the State of Georgia in which the leaf tobacco handled and sold by the appellants in their warehouses can be manufactured into finished products. R. p. 335. The result necessarily is that all of the leaf tobacco goes into States where there are such factories, such as North Carolina, Virginia and Kentucky, and foreign countries. This "stream" or "flow" of commerce continues without any intermediate handling as a practical matter. The buyers of

the leaf tobacco are persons who live without the State of Georgia and who come into the State and to these sales at appellants' warehouses for the sole purpose of buying the tobacco, with no intent other than to ship it immediately outside of the State to factories for the purpose of manufacturing it into a salable product.

There are many decisions by this Court on this subject. We call attention to a few of them.

Lemke, as Attorney General of the State of North Dakota, et al, v. Farmers Grain Co. of Embden, N. D., reported in 258 U. S. 50, is a leading case. This decision originated in a suit brought by a co-operative association incorporated under the laws of North Dakota and engaged in the business of operating a public elevator and warehouse for the purchase, sale, distribution and storage of wheat, oats, rye, etc. The purpose of the suit was to enjoin enforcement of the North Dakota Grain Grading and Inspection Act, passed February 11, 1919. The bill of complaint was based upon two grounds: First, that the statute was an unlawful regulation of and burden upon interstate commerce and, therefore, violated the commerce clause of the Federal Constitution; and, second, that the State statute was in conflict with the Federal Grain Standards Act of August 11, 1916. This Court states:

> "The record disclosed that North Dakota is a great grain-growing State, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant, and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota, to be shipped to and sold at terminal markets in other States, the principal markets being at

Minneapolis and Duluth. There is practically no market in North Dakota for the grain purchased by complainant. The Minneapolis prices are received at the elevator of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his 'spread,' or margin, of profit. The purchases are generally made with the intention of shipping the gain to Minneapolis. The grain is placed in the elevator for shipment, and loaded at once upon cars for shipment to Minneapolis and elsewhere outside the State of North Dakota. The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain,—Minneapolis, Duluth, or elsewhere. This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. The market for grain bought at Embden is outside the State of North Dakota, and it is an unusual thing to get an offer from a point within the State. After the grain is loaded upon the cars, it is generally consigned to a commission merchant at Minneapolis. At the terminal market, the grain is inspected and graded by inspectors licensed under Federal law."

With very little difference in language, the above would describe the business which is conducted by the appellants in the case at bar.

This Court says in the Lemke case:

"That such course of dealing constituted interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle."

This Court refers to *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, in which case the facts disclose that a company organized in Tennessee, and carrying on business there, went into Kentucky, and, through an agent there bought wheat for shipment to the company's mill in Tennessee. The State Court held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee company amenable to the regulatory statutes of the State. This Court rejected the conclusion of the State court, and held that the buying, no less than the selling, of the grain, under such circumstances, was a part of interstate commerce, committed to national control by the Federal Constitution.

This Court in the Lemke case concludes its opinion with this statement:

> "We agree with the Circuit Court of Appeals that this legislation is beyond the power of the State, as it is a regulation of interstate commerce when applied to complainant's business."

There was a dissent in the Lemke case, but the dissent does not deny that the transactions were interstate commerce.

Selling and Buying Constitute A Part of Interstate Commerce.

This subject is treated in the Lemke case at page 55, where this Court, in discussing other cases, states:

> "None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond State lines. It is true, as appellants contend, that after the wheat was

delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in, the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions."

See *Swift & Co. v. United States*, 196 U. S. 375, 398, 399.

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, at 290, deals specially with this subject. We quote from it as follows:

"The commerce clause of the Constitution, Art. I, §8, cl. 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. *Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse.* Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown v. Maryland*, 12 Wheat. 419, 446-447; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 519. On the same principle, *where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. American Express Co. v. Iowa*, 196 U. S. 133, 143. This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton v. Missouri*, 91 U. S. 275, 280: 'Commerce is a term of the largest import. *It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities.*' In *Kidd*

v. Pearson, 128 U. S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In *United States v. E. C. Knight Co.*, 156 U. S. 1, 13, 'contracts to buy, sell, or exchange goods to be transported among the several States' were declared 'part of interstate trade of commerce.' And in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 241, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last.

"A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; *and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. Crutcher v. Kentucky*, 141 U. S. 47, 57; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 27; *International Textbook Co. v. Pigg*, 217 U. S. 91, 112; *Sioux Remedy Co. v. Cope*, 235 U. S. 197."
(Italics ours.)

See *The Pipe Line Cases*, 234 U. S. 548, 560.

The State of North Dakota adopted another law in 1923 which undertook to cure the trouble which had been pointed out in the law involved in the Lemke case, 258 U. S. A case

grew then out of this latter law and is reported as *Shafer v. Farmers Grain Co. of Embden, et al*, 268 U. S. 189. In that case this Court adhered to its rulings made in the Lemke case and held that the differences between the two laws were not sufficient. At page 198 the Court said:

> "Buying for shipment, and shipping, to markets in other States when conducted as before shown constitutes interstate commerce—the buying being as much a part of it as the shipping. We so held in *Lemke v. Farmers Grain Company*, supra, following and applying the principle of prior cases. Later cases have given effect to the same principle."

The opinion cites *Stafford v. Wallace*, 258 U. S. 495, 516, and *Binderup v. Pathe Exchange*, 263 U. S. 291, 309, and continues:

> "Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nation-wide. The right to buy it for shipment, and to ship it, in interstate commerce is not a privilege derived from State laws and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the States by the commerce clause of the Constitution."

This Court to sustain this last position cites a number of cases, some of which have been heretofore referred to. The cases cited are: *Crutcher v. Kentucky*, 141 U. S. 47, 57; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 21; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229, 260; *Buck Stove Co. v. Vickers*, 226 U. S. 205, 215; *Adams Express Co. v. New York*, 232 U. S. 14, 31; *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 291, 292.

The case of *Binderup v. Pathe Exchange*, 263 U. S. 291, beginning at page 309, is of very great interest. It deals with the transportation of films from New York to Nebraska to be shown there and then sent to various destinations. This case cites a great many cases, and discusses the interstate commerce feature of the transportation of the films at considerable length.

The same may be said of *Stafford v. Wallace*, 258 U. S. 495. We quote from the third headnote as follows:

> "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."

and that in turn is quoted from *Swift & Co. v. United States*, 196 U. S. 375, 399.

In *Carter v. Carter Coal Co.*, 298 U. S. 238, the "Guffy Act" was held unconstitutional, but this Court's opinion goes into the question of what is interstate commerce, and when a commodity may be said to have become a part of interstate commerce. At page 303 it is said:

> "Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence; commerce disposed of it."

If this principle be applied to this case, we have a situation where the growing and curing of tobacco corresponds to the mining of coal, but the auction sale thereof, in the warehouse, is clearly commerce. The disposition of the tobacco, by reason of the unique situation in Georgia, is not possible to be other than across State lines.

The *Carter* case must now be considered in connection with the National Labor Board cases, decided April 12, 1937. In these late cases this Court held the Carter case not controlling, but the decisions show that interstate intercourse may begin with production rather than *sale* and *shipment*. The Labor Board cases are certainly an extension of the conception of interstate commerce as heretofore expressed in the decisions.

There is a "flow of commerce" here. As said in the *Carter* case, at page 306:

> "In the Schechter case (295 U. S. 495), the flow had ceased. Here (the Carter case) it had not begun. The difference is not one of substance. The applicable principle is the same."

The case at bar is one where growth, culture and production of tobacco is ended. As soon as the tobacco crosses the warehouse threshold certainly it then joins the flow of commerce, if not before that point, which continues until it reaches the buyer's storage house or manufactory, in other States and foreign countries, where the production of cigarettes begins, and a new cycle commences.

In 1893 this Court decided the case of *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204. The majority there held that the State of Kentucky could not legislate to the extent of fixing the tolls to be charged by the Bridge Company which owned the bridge over the Ohio River connecting the State of Kentucky with the State of Ohio. In the headnotes the majority opinion held:

> "1. That the traffic across the river was interstate commerce;

"2. That the bridge was an instrumentality of interstate commerce;

"3. That the statute was an attempted regulation of such commerce which the State had no constitutional power to make."

The majority opinion held that the regulation of these tolls by the State was a burden on the interstate commerce. Certainly, in the case at bar, the warehouses of these appellants are very similar to the bridge in the Covington case. It is over this bridge, that is, through these warehouses, that every pound of tobacco produced in Georgia passes on the trip from the fields to the manufacturing plants located in other States and foreign countries. The Act of the Georgia Legislature, fixing the charges of these warehouses, is in effect regulating the "tolls" charged for use of this "bridge."

Warehousing is not manufacturing or production, but it is certainly the disposition of the tobacco, and the gateway through which interstate commerce flows.

We feel that we can certainly say that the sale of leaf tobacco involved in the case at bar to be shipped to other States in interstate commerce is a part of the "current of commerce among the States." At page 518 of the Stafford case this Court states, in reference to the cattle about to be shipped, that "the purchase of the cattle is a part and incident of such commerce."

In the Binderup case this Court quotes from the *Stafford v. Wallace* case, and then states:

"The transactions here are essentially the same as those involved in the foregoing cases, substituting the

word 'film' for the word 'livestock,' or 'cattle,' or 'meat.' Whatever difference exists is of degree and not in character." (p. 131.)

Suppose we substitute for the word "film," or for the word "livestock," or "cattle," or "meat," the word "tobacco"; we are obliged to answer that it appears to us these cases are controlling.

The cases of *Federal Compress Co. v. McLean*, 291 U. S. 17, and *Chassaniol v. Greenwood*, 291 U. S. 584, are not inconsistent with the position here taken. In fact the cases here relied on, *Dahnke-Walker Milling Co. v. Bondurant* and *Lemke v. Farmers Grain Co.*, supra, are cited in these two opinions and held to stand on a different footing.

The District Court in its opinion cites only the Chassaniol case, but this Court there says, at page 587:

> "Ginning Cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in the *preparation for the sale and shipment* in interstate or foreign commerce. But each step *prior to the sale and shipment* is a transaction local to Mississippi, a transaction in intrastate commerce."

In the case at bar it cannot be denied that the "sale" made in appellants' warehouses, the charges for which are sought to be regulated by the statute under attack, is to non-resident buyers and immediately the shipment goes forward, in practically every instance in interstate and foreign commerce to the buyers' factories in Kentucky, North Carolina, Virginia, other States, and abroad. The "sale and shipment" spoken of by Justice Brandeis in the above quoted opinion is the

business of these appellants. Their warehouses are all located on or near railroad sidetracks for this purpose. R. pp. 136, 139, 146.

Mr. W. W. Bernard testified, R. p. 342, as follows:

> "But in Georgia they take it out to the box cars; then the cars are placed, they are usually right outside the warehouse on the warehouse sidetrack."

See also R. pp. 481, 519.

The case of *Pennsylvania v. West Virginia*, 262 U. S. 553, is very important. The State of West Virginia, in a large part, but not in all, of its territory produces natural gas. It adopted an enactment requiring the withdrawing of natural gas from what the court calls "an established current of commerce" moving from the territory of West Virginia into the State of Pennsylvania and other States. The State of Ohio brought a like suit. The Act (Chapter 71, Acts 1919) undertook to compel retention within West Virginia of natural gas there produced that might be required for local needs. This Court held that the plaintiff had the right to bring the action. The fourth through the ninth headnotes of the case are as follows, and are fully discussed at the respective pages of the opinion:

> "4. A State wherein natural gas is produced and is a recognized subject of commercial dealings may not require of those producing and transporting it that, in its sale and disposal, consumers in that State shall be accorded a preferred right of purchase over consumers in other States, when the requirement necessarily will operate to withdraw a large volume of the gas from an established interstate current whereby it is supplied in other States, to consumers there. P. 595.

"5. The purpose of the Commerce Clause is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws, and to insure uniformity of regulation. It means, that, in the matter of interstate commerce, we are a single Nation—one and the same people. P. 596.

"6. The transmission of natural gas from one State to another, for sale and consumption in the latter, is interstate commerce, and a state law, whether of the State where the gas is produced or of that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission, is a regulation of interstate commerce—a prohibited interference. P. 596.

"7. The power of a State to require gas pipe-line companies to furnish reasonably adequate service within reasonable territorial limits, will not enable her to enforce preference to local consumption at the expense of interstate business which has grown up with her sanction and encouragement. P. 697.

"8. Interference with interstate commerce in natural gas cannot be justified upon the ground that it is a measure designed to conserve the gas, as a natural product of the State in the interest of her people, because the gas has become a necessity and the supply is no longer sufficient to satisfy local needs and be used abroad. P. 598. *West v. Kansas Natural Gas Co.*, 221 U. S. 229.

"9. The Court, on full consideration, having reached the conclusion that the West Virginia Act is unconstitutional, and that its intended enforcement will subject the complaining States to injury of serious magnitude, operating with obvious inequity against them,—the appropriate decree is one declaring the act invalid, and enjoining its enforcement, leaving any needed regula-

tion of the interstate commerce involved to be sought elsewhere. P. 600."

A case likewise in point is *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229. The matter involved was the legality of an Act of the Legislature of the State of Oklahoma regulating the laying, constructing, and maintaining and operating of gas pipe lines for the transportation of natural gas within the State of Oklahoma, etc. The Act is set out in full at pages 241-4. The constitutional validity of that statute was attacked. This Court considered the case at very great length. It is stated that:

> "When a State recognizes an article to be a subject of interstate commerce, it cannot prohibit that article from being the subject of interstate commerce; and so *held* that corporations engaged in interstate commerce cannot be excluded from transporting from a State oil and gas produced therein and actually reduced to possession." (headnote 1)

Probably the reduction to possession in this case is the chief distinction between it and the *Pennsylvania v. West Virginia* case in 262 U. S., from which we have quoted. In the latter case, natural gas had not been reduced to possession, but none the less it was held to be a subject of interstate commerce. In the case at bar, the thing in dispute and being sold—tobacco, that is, leaf tobacco—has been reduced to possession, so there can be no dispute whatsoever that the leaf tobacco in the case at bar is a subject of interstate commerce.

The Oklahoma case states that:

> "In matters of foreign and interstate commerce, there are no State lines; in such commerce instead of

the States a new power and a new welfare appears that transcend the power and welfare of any State. (headnote 2)

"The welfare of the United States is constituted of the welfare of all the States, and that of the States is made greater by mutual division of their resources; this is the purpose and result of the commerce clause of the Constitution." (headnote 3)

At page 261 of the opinion this Court says:

"The inaction of Congress is a declaration of freedom from State interference with the transportation of articles of legitimate interstate commerce, and this has been the answer of the courts to contentions like those made in the case at bar."

This Court quotes from *Haskell, Governor, v. Cowham*, 187 Fed. 403, to the effect that:

"No State by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof.

"No State by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

The law is that the power of the States over interstate commerce is non-existent, even in the absence of action by Congress. This statute is a *direct* regulation of interstate and foreign commerce and an instrumentality thereof.

CONGRESS HAS ACTED AND
ENTERED THIS FIELD.

The Act of Congress passed August 23, 1935, U.S.C.A. Title 7, Section 511, et seq., known as the Tobacco Inspection Act, is a statute regulating tobacco warehouses in some respects. It is primarily a grading statute, but shows clearly (Sec. 511 (1)) that this commodity is reasonably connected with interstate and foreign commerce, and on this assumption the national power is sought to be exerted.

DISCUSSION OF *Tagg Bros. & Moorhead v. United States*, 280 U. S. 421.

This is a stockyards case and arose under the Act of Congress of August 15, 1921, (U.S.C., Title 7, Sec. 201-217). Under that Act it was declared that persons engaged in the business of buying or selling in interstate commerce livestock at a stockyard on a commission basis are "market agencies" and among other things power is conferred upon the Secretary of Agriculture to determine what are the just and reasonable rates or charges for their services. The Secretary prescribed a tariff of maximum charges for such services at the Omaha stockyard, effective January 1, 1927. Each agency had a pen or pens owned by the stockyards and rented from them. These agencies were performing an indispensable service in interstate commerce and in livestock, and enjoyed a substantial monopoly of the Omaha stockyards. They had eliminated rate competition. Fifty-eight concerns, all registered under the aforesaid Act as such market agencies, and comprising the entire membership of the Omaha Livestock Exchange, brought this suit against the United States,

the Secretary of Agriculture, the Attorney General, and the United States Attorney for Nebraska. The prayers were that the order of the Secretary above mentioned be declared null and void, and that the defendants be enjoined from enforcing it by canceling the registration of the agencies, or by instituting proceedings to enforce the penalties prescribed by the act for violation of an order, or by other means. There were also prayers for a restraining order and for an interlocutory injunction.

The occasion for the Secretary's order above referred to was that the Omaha market agencies had filed with the packers and stockyards administration at Washington a schedule of charges known as Omaha Livestock Exchange Tariff No. 1. On January 16, 1926, they filed a new schedule, known as Tariff No. 2, which introduced higher rates to become effective January 26, 1926. The Secretary of Agriculture, acting on his own motion, issued on January 25th an order suspending the operation of the proposed schedule and giving notice of public hearings to be held before an examiner. Those hearings extended over many months. The market agencies participated through counsel, but introduced little evidence. The Government introduced much.

The application for an interlocutory injunction was made before three Judges pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913, which had been made applicable to packers and stockyards. Interlocutory injunction issued on consent of the government. The court below found for the defendants on final hearing and entered a final decree dissolving the interlocutory injunction and dismissing the bill (29 Fed. (2d) 750). Appeal to this Court was allowed.

This Court held that the rates of the market agencies were subject to regulation under the authority of Congress "to prevent their services from becoming an undue burden upon and obstruction of interstate commerce." (280 U. S. 431, 436). At page 437, is stated the method in which these market agencies do business as follows:

> "When a producer wishes to sell his live stock on the exchange, he ships it by rail or motor truck, or drives it on foot, to an agency at the stockyards. After the stock is unloaded, it is driven by the agency to its pens, sorted, watered, fed and offered by it for sale. The feed is provided by the stockyards corporation on order of the agency and a separate charge is made therefor by the corporation. When a purchaser is found, the stock is driven to the yard scales and weighed. Responsibility passes to the purchaser, or to the agency acting for him, as the stock is taken off the scales. Shipments are generally sold on the day of delivery and payments are made on the same day or the next morning. The agency remits the proceeds to the shippers at once, after deducting its commissions, freight, yardage, feed, inspection and other charges."

The Secretary of Agriculture claimed that his orders issued in the premises were valid and operative. The court below held that the same rules were to be applied in the construction and application of the orders under the Packers and Stockyards Act as are applied under the Interstate Commerce Act. This Court accepted that view (p. 442 of the opinion). The right of the Government to fix these rules and duties was a part of the law.

In the case of *Virginia Railway Co. v. System Federation No.* 40, *etc., et al,* No. 324, October term, decided March 29,

1937, this Court, in discussing the transactions that affect interstate commerce and are subject to the power of Congress to regulate, says in the second division of the opinion:

> "It is the nature of the work done and its relation to interstate transportation which afford adequate basis for the exercise of the regulatory power of Congress."

In the recent cases of *Associated Press v. National Labor Relations Board, National Labor Relations Board v. Jones & Laughlin Steel Corporation, National Labor Relations Board v. Fruehauf Trailer Co., National Labor Relations Board v. Friedman-Harry Marks Clothing Co., Inc., decided* April 12, 1937, this Court had occasion to examine the extent of Congressional power over interstate and foreign commerce. In the *Jones & Laughlin Steel Corporation* case it was said:

> "The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other resources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement' (The Daniel Ball, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*County of Mobile v. Kimball*, 102 U. S. 691, 696, 697); 'to foster, protect, control and restrain.' *Second Employers' Liability Cases*, supra, (223 U. S. 1, 51) p. 47. See *Texas & N. O. R. Co. v. Railway Clerks*, supra, (281 U. S. 548, 570). That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' *Second Employers' Liability Cases*, p. 51; *Schechter Corporation v. United States*, supra, (295 U. S. 495).

"Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Corporation v. United States*, supra. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Id. The question is necessarily one of degree. As the Court said in *Chicago Board of Trade v. Olsen*, supra, (262 U. S. 1) p. 37, repeating what had been said in *Stafford v. Wallace*, supra, (258 U. S. 495): 'Whatever amounts to more or less constant practice and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it.'"

In the case at bar the appellees are undertaking to enforce not an order of the Interstate Commerce Commission, but an Act of the General Assembly of Georgia which was and is enacted without power. They seek to maintain their defense on the theory that what is undertaken to regulate is intrastate commerce, when in truth it is interstate commerce.

The decisions which are relied upon in this case by appellants were all referred to in *Schechter Corporation v. United States*, 295 U. S. 495, 543. Under the rulings there laid

down, the sales involved in the case at bar must of necessity be in interstate commerce.

This Case Is Different From Those Cases Wherein a Commodity Comes to Rest in a State with no Intention of Being Again Shipped in Interstate or Foreign Commerce.

The tobacco involved in this case did not come into Georgia. It is grown in Georgia and is brought to appellants' warehouses for sale, and is, by another person acquired and shipped in interstate commerce or foreign commerce. The shipments here exactly meet the differentiations which are noted in the *Schechter Corp. case*, 295 U. S. 495 at 543. This Court differentiates the Schechter case from the cases we have relied upon.

Note for instance *Swift & Company v. United States*, 196 U. S. 375, where cattle were sent for sale from a place in one State, with the expectation they would end their transit, after purchase, in another State, and when in effect they did so, with only the interruption necessary to find a purchaser at the stock yards. This Court held that "when this is a constantly recurring course, it constitutes interstate commerce and the purchase of the cattle is an incident of such commerce."

Note also the *Carter Coal case*, supra, in which it was held that interstate commerce had not yet begun, and the attempted regulation was of production, rather than commerce.

The Statute Cannot Be Sustained as a Lawful Exercise of the State's Police Power.

The legitimate exercise of the police power comprehends enactments which directly affect the *public* morals, the *public* health, the *public* safety, and the *general* welfare. Can it be said that the reduction of appellants' fees for selling tobacco by and through this statute directly affects more of the general public of the State of Georgia than the limited number of appellants here and the growers of tobacco? Numerically, they are a very small number of the inhabitants of the State; territorially, only 20 of the State's 159 counties are involved. The business is in no sense a *public* business, catering to the *general* population.

The manner of conducting the business of tobacco warehousing and the nature of the transactions have been fully discussed hereinabove. That it is not a business "affected with a public interest" and "clothed with a public use" is apparent from this discussion. The mechanical formula heretofore used to divide business into the two classes of (1) those that can be so regulated and (2) those that cannot, came into the decisions of this Court in the case of *Munn v. Illinois*, 94 U. S. 113. The language there used is as follows:

> "When the owner of a property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use. He may withdraw his grant by discontinuing the use."

This reasoning was used in the first cases deciding and establishing the power in the State to regulate railroads as businesses affected with a public use and in which the public had an interest.

C. B. & Q. R.R. Co. v. Iowa, 94 U. S. 155;
Peik v. C. & N.W. Ry. Co., 94 U. S. 164;
Ruggles v. Illinois, 108 U. S. 526.

It is significant that as early as 1885, ten years after the Munn decision, this Court begins to narrow if not to change this formula.

Compare *Stone v. Farmers Loan & Trust Co.* (Railroad Commission cases), 116 U. S. 307, at page 331, where it is said:

> "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

See also *C. M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, at 457:

> "No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses

before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

"'. . . In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

See also *Missouri Pacific Ry. Co. v. Nebraska* (1896), 164 U. S. 403.

The Munn formula, however, was applied to grist mills, that is, public or custom mills in 1876—*Township of Burlington v. Beasley*, 94 U. S. 310; to public water companies in

Spring Valley Waterworks v. Schottler (1883), 110 U. S. 347.

Again, the statutes regulating, to the point of price fixing, grain elevators were before the court in 1891,—

Budd v. New York, 143 U. S. 517; and in 1894—

Brass v. North Dakota, 153 U. S. 391.

This last case is the extreme application of this formula.

In 1894 a significant decision refusing to apply the Munn formula was *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204. Here this court recognizes that despite the Munn formula and decision, the regulation of bridge tolls by the State of Kentucky on a bridge over the Ohio River, between Kentucky and Ohio, was not constitutional. Interstate commerce begins to appear fully as a basis for the holding that lack of power exists in the State to regulate businesses which involve interstate commerce.

In *Cotting v. Kansas City Stock Yards Co.* (1901), 183 U. S. 79, this court discusses the Munn formula, but holds the Kansas statute, fixing prices for the stock yard there involved, to be unconstitutional.

The case of *McLean v. Arkansas*, 211 U. S. 539 (decided in 1909), holds that coal mines were subject to "regulation," requiring payment of miners' wages on basis of unscreened coal and such regulation was a proper exercise of the state police power.

In the last thirty years there have been many attempts to

regulate various private businesses to the extent of price fixing. The following businesses have been held to be not so affected with a public interest as to be subject to such price fixing legislation:

Butchers, bakers, tailors, wood choppers, mining operators, food preparation factories:

Wolff Packing Co. v. Court of Industrial Relations (1923), 262 U. S. 522;

Making and selling of ice:

New State Ice Co. v. Liebman (1932), 265 U. S. 262;

Employment agencies:

Adams v. Tanner (1917), 244 U. S. 590;

Ribnik v. McBride (1928), 277 U. S. 351;

Sale and distribution of gasoline:

Williams v. Standard Oil Co. (1929), 278 U. S. 235;

The selling of theatre tickets:

Tyson & Bro. v. Banton (1927), 273 U. S. 418.

The Business of Conducting and Operating a Tobacco Wakehouse Is Not So Affected With a Public Interest as to Justify Legislative Regulation.

In *Tyson and Brother v. Banton*, 273 U. S. 418, it is held:

> "The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of

the property itself, and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments."

The tenth headnote is as follows:

"The language of an opinion (*Munn v. Illinois*, 94 U. S. 113, 126) must be limited to the case under consideration."

At page 432, et seq., of the opinion this Court holds:

"The leading, as well as the earliest, definite decision dealing with a business falling within that class is *Munn v. Illinois*, supra, which sustained the validity of an Illinois statute fixing the maximum charge to be made for the use of elevators and warehouses for the elevation and storage of grain.

"As ground for that decision the opinion recites, among other things, that grain came from the west and northwest by water and rail to Chicago where the greater part of it was shipped by vessel to the seaboard and some of it by railway to eastern ports; that Chicago had been made the greatest grain market in the world; and that the business had created a demand for means by which the immense quantity of grain could be handled or stored and these had been found in grain elevators. In this way the largest traffic between the country north and west of Chicago and that lying on the Atlantic coast north of Washington, was in grain passing through the elevators at Chicago. The trade in grain between seven or eight of the great states of the west and four or five of those lying on the seashore, formed the largest part of the interstate commerce in these states. The elevators in Chicago were immense structures, holding from 300,000 to 1,000,000 bushels at one time. Under these circumstances, it was said that the elevators stood in the very 'gateway of commerce' and took toll from

all who passed; that their business certainly tended to a common charge and had become a thing of public interest and use; that every bushel of grain for its passage paid a toll, which was a common charge; and, finally, that if any business could be clothed 'with a public interest, and cease to be *juris privati* only,' this had been made so by the facts.

"There is some general language in the opinion which, superficially, might seem broad enough to cover cases like the present one. It was said, for example, (P. 126) 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.' Literally, that would include all the large industries and some small ones; but in accordance with the well settled rule the words must be limited to the case under consideration. *Cohens v. Virginia*, 6 Wheat. 264, 399; *Plumley v. Massachusetts*, 155 U. S. 461, 474. Indeed, the language quoted is qualified immediately by a statement of the general rule, that—'When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.'

"The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, as in terms it is expressed at page 130, that it shall be devoted to 'a public use.' Stated in another form, a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public. See *Louisville, etc. R.R. Co. v. West Coast Co.*, 198 U. S. 483, 500. The subsequent elevator and warehouse cases, *Budd v. New York*, 143 U. S. 517, and *Brass v. Stoeser*, 153 U. S. 391, while

presenting conditions of less gravity, rest upon the authority of the *Munn* case. The differences among the three cases are in matters of degree."

In *Chesapeake and Potomac Telephone Co. v. Manning*, 186 U. S. 238, at 246, this Court held:

> "And we start with the proposition that it cannot be presumed that a legislature intends any interference with purely private business. It cannot ordinarily prescribe what an individual or corporation, engaged in a purely private business, shall charge for services, and, therefore, although the language of a statute may be broad enough to include such private business, it will generally be excepted therefrom in order to remove all doubts of the validity of the legislation. It appears that some portion of the defendant's business is of a purely private nature, the receipts whereof are spoken of in its reports as private rentals, and as to such business Congress could not, if it would, prescribe what shall be charged therefor."

In the case of *Wolff Packing Co. v. Court of Industrial Relations of the State of Kansas*, 262 U. S. 522, the State of Kansas created what it called an Industrial Court which required compulsory arbitration in certain circumstances to fix the wages of employees. It is claimed in this case that the Act declared that the manufacture and preparation of food for human consumption was affected with a public interest and the power of the legislature so to declare and then to regulate the business extends to fixing wages and terms of employment to secure continuity of operation.

This Court reversed the Supreme Court of Kansas, which had sustained the Industrial Court, in these respects. It was stated that:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. *State v. Edwards*, 86 Me. 102; *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, 254.

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. *Munn v. Illinois*, 94 U. S. 113; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Budd v. New York*, 117 N. E. 1, 27; s.c. 143 U. S. 517; *Brass v. Stoeser*, 153 U. S. 391; *Noble State Bank v. Haskell*, 219 U. S. 104; *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389; *Van Dyke v. Geary*, 244 U. S. 39, 47; *Block v. Hirsh*, 256 U. S. 135."

but this Court said:

> "It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry."

This Court held that the circumstances which charge a business with a public interest must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

This Court rejected the argument that the declaration of the legislature that the business of food preparation "if affected with a public interest and devoted to a public use should be most persuasive with the court and that nothing but the clearest reason to the contrary will prevail with the Court to hold otherwise." In its opinion, at page 537, this Court states:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or

business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

This Court recognized that changing circumstances might bring under regulation a property or business not theretofore under such regulation, and says:

"But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify, regulation of rates."

Again, it is said at page 539:

"To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner."

MUNN v. ILLINOIS, 94 U. S. 113.

This is one of the Granger cases and was decided at the October term, 1876. The opinion beginning at page 123 states the question to be determined to be

"Whether the General Assembly of Illinois can, under the limitations upon the legislative power of the United States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses, at Chicago and other places in the State having not less than one hundred thousand inhabitants, in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It will be noted that the statute of Illinois was passed pursuant to a then recently adopted constitution which the people of Illinois accepted. "Public warehouses" were defined in the constitution as including grain elevators. No similar constitutional provision or statute is found in Georgia.

The grain warehouses or elevators in that case were very large, holding from 300,000 to 1,000,000 bushels at one time. They were divided into bins of large capacity and great strength. They were located with the river harbor on one side and the railway tracks on the other and the grain was run through them from car to vessel, or boat to car, as might be demanded in the course of business. It was impossible to preserve each owner's grain separately and this gave rise to a system of inspection and grading, by which the grain of different owners was mixed, and receipts issued for the number of bushels which were negotiable, and redeemable in like kind, upon demand. There were 14 warehouses adapted to this particular business and owned by about 30 persons. Through these warehouses passed the grain of seven or eight great States of the West.

This case stood at the threshold of a changing concept. It announced the principle that the fixing of rates of common carriers and of other properties affected with a public interest was for the legislative discretion and that this discretion, having been exercised, could not be disturbed in the courts. This latter provision has long been overturned. It was virtually undone in *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307 at 331. It was actually destroyed in *Chicaco, etc. R.R. v. Minnesota*, 134 U. S. 418 at 456. The position taken by this Court to the effect that the States could regulate

the rates of the warehouses involved for services rendered to grain moving in interstate commerce and which did not lose its interstate qualities was repudiated in *Wabash Ry. Co, v. Illinois*, 118 U. S. 557, 569-70, October Term, 1886.

In this case the warehouses are not used for storage; they are used simply for the purpose of selling, and the warehouse becomes simply a place where the people meet and where the commodity is arranged for orderly sale; where sales are made and accountings had. There is no monopoly in this warehouse business. On the other hand, there seems to be a great over-crowding of facilities.

In the Munn case transportation was involved, interstate and intrastate.

The commodity passed completely out of the control of the owner and became commingled with the grain of others. In the tobacco case, the owner never loses identity or control over his property. It never becomes commingled with the property of others. He can withdraw it from a sale at any time even after it has been knocked down. He may resell in the same warehouse or he may take it to another warehouse in the same or another community and do that without having incurred any charge. The Munn case regulated the charges for a whole service. The Georgia Act undertakes to regulate the price which is to be charged or exacted for personal and individual services, dividing the charge into its elements.

The Munn case cannot be a precedent for rulings in this case.

The first headnote in the case of *New State Ice Co. v. Liedmann*, 285 U. S. 262, is as follows:

> "The business of manufacturing ice and selling it is essentially a private business and not so affected with a public interest that a legislature may constitutionally limit the number of those who may engage in it, in order to control competition."

At page 277 of the opinion this Court held:

> "We have thus, with some particularity, discussed the circumstances which, so far as the State of Oklahoma is concerned, afford ground for sustaining the legislative pronouncement that the business of operating cotton gins is charged with a public use, in order to put them in contrast with the completely unlike circumstances which attend the business of manufacturing, selling and distributing ice. Here we are dealing with an ordinary business, not with a paramount industry upon which the prosperity of the entire State in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that in Oklahoma ice is not only an article of prime necessity, but indispensable; *but certainly not more so than food or clothing or the shelter of a home*. And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use; and that the same is true in respect of the business of renting houses and apartments, except as to temporary measures to tide over grave emergencies. See *Tyson v.*

Banton, supra, (273 U. S. 418), pp. 437-438, and cases cited."

At page 278 it is said:

"Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistently with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a State, 'under the guise of protecting the public arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" The court cites *Burns Baking Co. v. Bryan*, 264 U. S. 504, 513; *Liggett v. Baldridge*, 278 U. S. 105, 113.

At page 280 it is said:

"The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the State is not entitled to dispense in the interest of experiments. This principle has been applied by this court in many cases. *Dorchy v. Kansas*, 264 U. S. 286; *Wolff Co. v. Industrial Court*, 262 U. S. 522; 267 U. S. 552; *Pierce v. Sisters*, 268 U. S. 510; *Nixon v. Herndon*, 273 U. S. 536; *Tumey v. Ohio*, 273 U. S. 510; *Menley v. Georgia*, 279 U. S. 1; *Washington v. Roberts*, 273 U. S. 116; *Chicago St. P., M. & C. Ry. Co. v. Holmberg*, 282 U. S. 162; *Stromberg v. California*, 283 U. S. 359; *Near v. Minnesota*, 283 U. S. 697. In the case last cited, the theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press. The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection."

In *Ribnik v. McBride*, 277 U. S. 350, at 358-9, the first headnote is:

> "The business of an employment agent is not one 'affected with a public interest'; and, under due process clause of the Fourteenth Amendment, a State cannot fix the fees which such an agent may charge for his services. P. 355."

This Court further said:

> "And we since have held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices. 'The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on.' *Tyson & Brother v. Banton*, supra, p. 431; and see pp. 440-441.
>
> "To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this Court. These are grounds for regulation but not for price fixing, as we have already definitely decided. *Tyson & Brother v. Banton*, supra, 442-445.
>
> "There are a number of states which have statutes like that now under consideration, and we are asked to give weight to that circumstance. It is to be observed, however, that with the exception of the decision now under review none of these statutes has been judicially considered, except in the State of California, where the legislation was declared unconstitutional. *Ex parte*

Dickey, 144 Cal. 234; *In re Smith*, 193 Cal. 337. And it was said in oral argument, and not disputed, that, while legislation of this character existed in several states, generally it was not enforced, in some instances because the state's attorney-general had advised that the legislation was unconstitutional. In any event, under all the circumstances, and in the face of our prior decisions, we do not regard the mere existence in other states of statutory provisions like the one now under review as entitled to persuasive force."

In *Wilson v. New*, 243 U. S. 332, the Adamson Law was upheld and in *Block v. Hirsh*, 256 U. S. 135; *Brown Holding Co. v. Feldman*, 256 U. S. 170, this Court upheld the renting law of New York and the District of Columbia. These cases, however, are clearly distinguishable, as they were decided on the statute which recited as a basis for the regulation of these particular businesses the existence of a grave emergency. See *Tyson & Brother v. Banton*, supra. It has been held that the insurance business was so affected by a public interest that it was subject to regulation. *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389. However, the trend of the decision was changed by the opinion in *Wolff Packing Co. v. Court of Industrial Relations of the State of Kansas*, supra.

THE BUSINESS OF TOBACCO WAREHOUSING IS NOT SUBJECT TO SUCH REGULATION AS PRICE FIXING.

In the case of *Ribnik v. McBride*, 277 U. S. 350, at 357, it is said:

"Under the decisions of this Court it is no longer

fairly open to question that, at least in the absence of a grave emergency, *Tyson & Brother v. Banton*, supra, pp. 431, 437, the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation *controlling prices to be paid for services rendered* in securing a place for an employee or an employee for a place." (Italics ours.)

See also:

Tagg Brothers v. United States, 280 U. S. 420, 438;

Tyson & Brother v. Banton, supra.

In the case of *Williams v. Standard Oil Company of Louisiana*, 278 U. S. 235, this Court held:

"The business of dealing in gasoline is not affected with a public interest which will enable the State *to fix prices for its sale.*" (4th headnote.)

This Court in its opinion, at page 239, states:

"It is settled by recent decisions of this Court that a State legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business of property involved is 'affected with a public interest.' "

At page 240 this Court says:

"In support of the Act under review, it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the State. But we are here concerned with the character of the business, not with its size or the extent to which the com-

modity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.' Those decisions control the present case."

There is no decision from the Supreme Court of Georgia holding tobacco warehousing a business affected with a public interest or clothed with a public use.

The Right to Conduct One's Business and to Contract Is Protected by the Due Process Clauses of the Fifth and Fourteenth Amendments and Is Free From Legislative Price Fixing.

In *Highland v. Russell Car Co.*, 279 U. S. 253, at page 261, this Court held:

> "It is everywhere recognized that the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired." Citing *Steele v. Drummond*, 275 U. S. 199, 205.

The same opinion continues at page 261:

> "Generally speaking, that right is protected by the due process clauses of the Fifth and Fourteenth Amendments." Citing *Allgeyer v. Louisiana*, 165 U. S. 578,

591; *Adair v. United States*, 208 U. S. 161, 174; *Coppage v. Kansas*, 236 U. S. 1, 14.

To illustrate the right of freedom of contract and how zealously it is preserved, private carriers for hire cannot be denied the use of the highway on condition that the private carrier becomes a common carrier and assumes the burdens of such carrier. *Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583.

The following businesses have been held to be not so affected with a public interest as to be the subject of price fixing legislation:

Butchers, bakers, tailors, wood-choppers, mining operators—*Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522. Making and selling ice—*New State Ice Co. v. Liebmann*, 285 U. S. 262. Employment agencies—*Ribnik v. McBride, Comm. of Labor*, 277 U. S. 358-9. Dealers in gasoline—*Williams v. Standard Oil Co.*, 278 U. S. 235. The selling of theatre tickets—*Tyson & Brother v. Banton*, 273 U. S. 418.

It is, however, claimed in this cause that without a hearing, the charges to be made for auctioning and selling tobacco in a space occupied for that particular purpose may be controlled and that the prices once fixed so remain until repealed or changed by the General Assembly. We claim that is unjust, unreasonable and arbitrary.

NEBBIA v. NEW YORK, 291 U. S. 502.

The Nebbia case requires consideration in this connection in the light of the law as it stood prior to its rendition,

and especially the effect, if any, which said opinion had upon the cases which have been hereinbefore discussed.

The Nebbia case is based upon an Act of the General Assembly of New York which was adopted after the General Assembly of that State had the matter under consideration through a Joint Committee which was appointed on March 10, 1932, and consisted of members of the Senate and Assembly. The bill is Chapter 158 of the Laws of 1933 and creates a Milk Control Board with power, among other things, to "fix minimum and maximum . . . retail prices to be charged by . . . stores to consumers for consumption off the premises where sold." (291 U. S. 515.) The Board fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester, sold two quarts of milk and a five-cent loaf of bread for eighteen cents, and was convicted for violating the Board's order. A decision was rendered in the case with a dissent of four Justices, to-wit: Mr. Justice McReynolds, Mr. Justice Van Devanter, Mr. Justice Sutherland and Mr. Justice Butler.

The argument for the State of New York declared "the Milk Control Law was designed and enacted for the purpose of regulating the price of milk in the State of New York *temporarily and during a serious emergency*" (p. 511). (Italics ours.) The brief for the State of New York states that the Act was enacted "after a long and exhaustive investigation of conditions in the milk industry in the State, the Legislature found and determined that such an emergency existed. It is within the power of the Legislature to make this finding of fact, which is at least highly persuasive" (p. 511). As sustaining that statement, counsel for New York cites

Wilson v. New, 243 U. S. 332; *Block v. Hirsh*, 256 U. S. 135, 157; *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 245; *People ex rel Durham R. Corp. v. LaFetra*, 230 N. Y. 429, 445. The State's brief then states:

> "The temporary and emergent character of the legislation being accepted, it is well within the scope of the police power." Citing *People ex rel Durham R. Corp. v. LaFetra*, 230 N. Y. 429, and *People v. Perretta*, 253 N. Y. 305, 309.

This Court in the beginning of its decision says (p. 514) not only that the price of milk had been fixed by the General Assembly of New York, but it states:

> "During 1932, the prices received by farmers for milk were much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate and called for State aid similar to that afforded the unemployed, if conditions should not improve."

After referring to the fact that a joint legislative committee had been created on March 10, 1932, this Court states that the committee organized May 6, 1932, and its activities lasted nearly a year. It held 13 public hearings at which 254 witnesses testified and 2,350 typewritten pages of testimony were taken. Numerous exhibits were submitted. Under its direction an extensive research program was prosecuted by experts and official bodies and employees of the State and municipalities, which resulted in the assembling of much pertinent information. Detailed reports were received from over 100 distributors of milk, and these were collated and the information obtained analyzed. As a result of the study

of this material, a report covering 473 closely printed pages, embracing the conclusions and recommendations of the committee, was presented to the legislature April 10, 1933. This Court says:

> "This document included detailed findings with co[illegible]ous references to the supporting evidence; appendices outlining the nature and results of prior investigations of the milk industry of the State, briefs upon the legal questions involved, and forms of bills recommended for passage. The conscientious effort and thoroughness exhibited by the report lend weight to the committee's conclusions."

This Court then summarizes the Committee's conclusions, beginning at page 516. It found, in substance, that milk was an essential item of diet; that it could not long be stored; that it was an excellent medium for growth of bacteria; and that these facts necessitated safeguards in its production and handling for human consumption which greatly increased the cost of the business; that failure of producers to receive a reasonable return for their labor and investment over an extended period threatened a relaxation of vigilance against contamination. The Committee found that

> "Dairying yields fully one-half of the total income from all farm products. Dairy farm investment amounts to approximately $1,000,000,000.00. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the State."

It also dealt with the price decline and the causes therefor which include a periodic increase in the number of cows and in milk production, the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a de-

moralization of prices in the metropolitan area and other markets, and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream. It further found that under the best practicable adjustment of supply to demand, the industry must carry a surplus of about 20 per cent; that close adjustment of supply to demand is hindered by several factors difficult to control; that a satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk-shed; and so long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor; that indulgence in price-cutting—purchasing milk at blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) often compels the larger dealer to cut the price to his own and the producer's detriment." This Court finds (p. 518):

> "The legislature adopted Chapter 158 as a method of correcting the evils, which the report of the committee showed could not be expected to right themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry."

This Court held at page 536 as follows:

> "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory."

This Court cites: *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 535. It then continues:

> "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest' and 'clothed with a public use' have been brought forward as the criterion of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions *must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect.*". (Italics ours.) Citing: *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522; *Tyson & Brother v. Banton*, 273 U. S. 418; *Ribnik v. McBride*, 277 U. S. 350; *Williams v. Standard Oil Co.*, 278 U. S. 235.

This Court continues:

> "But there can be no doubt that upon proper occasion and by appropriate measures the State may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

This Court further states at page 537:

> "And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."

DISTINCTION BETWEEN THE NEBBIA CASE
(291 U. S. 502) AND THE CASES OF
TYSON & BROTHER v. BANTON, 273 U. S. 418;
WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELATIONS,
262 U. S. 522;
RIBNIK v. MCBRIDE, 277 U. S. 350; AND
WILLIAMS v. STANDARD OIL CO., 278 U. S. 235.

Let us compare *Tyson & Brother v. Banton*, 273 U. S. 418. Tyson & Brother—United Theatre Ticket Offices, Inc., was a duly licensed company engaged in the business of reselling tickets of admission to theatres and other places of entertainment in the City of New York, and its sales averaged approximately 300,000 tickets per annum. Section 167 of Chapter 590 of the New York Laws of 1922 declares that the price of or charge for admission to theatres, etc., is a matter affected with a public interest and subject to State supervision in order to safeguard the public against fraud, extortion, exorbitant rates and similar abuses. Section 172 forbids the resale of any ticket or other evidence of the right of entry to any theatre, etc., "at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry," such printing being required by that section.

The bill in this case was brought to prevent the enforcement of the above mentioned provision. It alleged threats on the part of the authorities to enforce the statute.

This Court in its opinion, at page 429, stated:

> "The statutory declaration (Sec. 167) is that the price of or charge for admission to a theatre, place of amusement or entertainment or other place where exhi-

bitions, games, contests or performances are held, is a matter affected with a public interest."

This Court appears to have carefully discussed the question of the right to fix prices and especially to fix prices of theatre tickets. By a five to four decision, this Court held that the Legislature did not have the right to regulate the price at which theatre tickets, etc., could be sold. At page 429, Mr. Justice Sutherland, who wrote the opinion, said:

> "In the endeavor to reach a correct conclusion in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, *Case of the State Freight Tax*, 15 Wall. 232, 278, and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments. See *City of Carrollton v. Bazzette*, 159 Ill. 284, 294. The power to regulate property, services or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all."

This Court further said, at page 430:

> "The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238, 246, but exists only where the business or the property involved has become 'affected with a public interest.'" (Italics ours.)

This Court at length discusses the phrase "affected with a public interest." The opinion clearly draws a distinction between the right to regulate and the right to fix prices. At page 431 it held:

> ". . . the mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is one which is always open to judicial inquiry."

It must be remembered that the *Tyson & Brother* case is one concerning which this Court said in the *Nebbia* case:

> "The decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect." (291 U. S. 567.)

The next case which this Court refers to in the *Nebbia* case is *Wolff Packing Co. v. Industrial Court*, 262 U. S. 522 (Kansas). The law there under consideration was known as "The Court of Industrial Relations Act of Kansas," Chapter 29, Special Session, Laws of 1920. The Charles Wolff Packing Company was a corporation of Kansas engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. It had total annual sales of $7,000,000, and more than half its products were sold beyond the State. It had 300 employees. This was considered rather a small establishment. The Act under consideration in this case prescribed a schedule of wages and the limitation of hours and rate of pay required for overtime, which resulted in an increase in wages of more than $400.00 a week. There had been no difficulty in securing all the labor it desired at the reduced rates offered. The highest court of the State had

passed upon the law and had held it to be constitutional. This Court rendered a unanimous decision holding the law to be unconstitutional—reversing the State Court.

The opinion was written by Mr. Chief Justice Taft. One paragraph of it, on page 537, is as follows:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, of the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

At page 543 of the opinion it states:

> "The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for regulation of the business of the plaintiff in error whose classification as public is at best doubtful. It is not too much to say that the ruling in *Wilson v. New* (243 U. S. 332) went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster. Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us.

"We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law."

Ribnik v. McBride, 277 U. S. 350, is the next case referred to in the Nebbia case. The first four headnotes of that case are as follows:

"1. The business of an employment agent is not one 'affected with a public interest'; and, under the due process clause of the Fourteenth Amendment, a State cannot fix the fees which such an agent may charge for his services.

"2. The power to require a license for, and to regulate the conduct of, a business is distinct from the power to fix prices.

"3. The fact that a business lends itself peculiarly to the practice of fraud, extortion and discrimination may be ground for regulation, but not for price-fixing.

"4. In determining the constitutionality of a State price-fixing statute, the mere fact that like statutes exist in other States—*held* not of persuasive force."

The opinion, at page 358, contains the following:

"And we since have held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices. 'The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on.' *Tyson & Brother v. Banton*, supra, p. 431; and see pp. 440-441.

"To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this Court. These are grounds for regulation but not for price fixing, as we have already definitely decided. *Tyson & Brother v. Banton*, supra, 442-445."

Hegeman Farms Corp. v. Baldwin, 293 U. S. 163:

The New York Milk Control Act was amended and continued with the laws of 1934 (Chap. 126). In this case the Milk Control Act of 1933 was attacked as a whole. The attack was dismissed on authority of the Nebbia case (291 U. S. 502). That dismissal was not pressed in the Supreme Court. It was treated as abandoned. By orders issued under the New York Control statute dealers were required to pay producers of milk a minimum price per quart, and were subject to higher minimum resale prices. Competition made it impossible for the dealer in this case to sell for more than the resale minimum, and the "spread" or difference between that and the minimum purchase price was not enough to cover the cost of the operations. This Court held:

"That upon these facts only, with nothing to show the degree of efficiency with which its business was conducted, there is no ground to conclude that the price limits are arbitrary and therefore in violation of the due process clause of the Fourteenth Amendment."

This Court reduces the bill to this finality:

"The appellant's grievance amounts to this, that it is operating at a loss, though other dealers more efficient

or economical or better known to the public may be operating at a profit."

This Court was not dealing here with a maximum price. It was dealing with a minimum price and the dealer had the right to increase the minimum price. This Court held at page 171:

> "If the price is not raised, the reason must be that efficient operators find that they can get along without a change. Either that must be so, or else, as was pointed out in the opinion below, the industry will perish. The bill does not suggest that such a catastrophe is imminent. True, of course, it is, that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger, but it is their comparative inefficiency, not tyrranical compulsion, that makes them laggards in the race. Whether a wise statecraft will favor or condemn this exaltation of the strong is a matter of legislative policy with which courts are not concerned."

Williams v. Standard Oil Co. of Louisiana, 278 U. S. 235:

The Standard Oil Company of Louisiana and The Texas Company brought suits in the District Court for the Middle District of Tennessee to enjoin the State officers, Williams and others, from carrying out their intention to enforce an Act to regulate the price of gasoline. This Court and the District Court considered the two cases together. A statute was adopted in Tennessee in 1927, the purpose and effect of which was to fix prices at which gasoline might be sold within the State. A Division of Motors and Motor Fuels was created in the Department of Finance and Taxation and authorized to collect and record data concerning the manufacture and sale of gaso-

line, freight rates, differentials in price to wholesalers and retailers, the cost and expense of production and sale, etc. The information thus collected was made available for use by the Commissioner of Finance and Taxation in the regulation of prices at which gasoline might be sold in the State of Tennessee. Permits for such sale were to be issued subject to the approval of the Commissioner, but only at the prices fixed and determined. Prices were to be fixed with a proper differential between the wholesale and retail price. Rebates, price concessions and price discrimination between persons or localities were forbidden. The prices were first to be stated by the applicant for a permit, and if not approved by the superintendent of the division were to be determined by that official, with a right of review by the commissioner, and finally by the courts. (See Public Acts of Tennessee, 1927, page 53.) A violation of the Act was made a misdemeanor and was punishable by fine and imprisonment.

Some of the headnotes of the case are as follows:

> "The business of dealing in gasoline, whatever its extent, is not a business 'affected with a public interest'; and State legislation undertaking to fix the prices at which gasoline may be sold, violates the due process clause of the Fourteenth Amendment."
>
> "A State may not impose as a condition on the doing of local business by a foreign corporation that it relinquish rights guaranteed by the Federal Constitution."
>
> "The provision of the Act forbidding any dealer to grant any rebate, concession or gratuity to any purchaser for the purpose of inducing him to purchase, use or handle the dealer's gasoline, and the provision forbidding discrimination by selling at different prices to purchasers in the same or in different localities, are

likewise mere appendants to the main purpose of price regulation, or if, separable, they are unconstitutional restrictions on the right of the dealer to fix his own prices. *Fairmont Co. v. Minnesota,* 274 U. S. 1."

In the opinion at page 240 this Court held:

"In support of the act under review, it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it had become necessary and indispensable in carrying on commercial and other activities in the State. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.' Those decisions control the present case."

If This Statute Be Upheld as Enacted Pursuant to the State's Police Power, Its Effect Is Unreasonable, Arbitrary and Capricious.

In *Nebbia v. New York,* 291 U. S. 502, the majority of this Court held the particular New York statute there involved to be a reasonable and proper exercise of the State's police power.

In the case at bar, there was no investigation of the subject of tobacco marketing in Georgia. Georgia is probably the

last State in the Union to become a tobacco market. The people who passed the purported Act here involved knew little of it. There were no emergent circumstances at hand. The tobacco crop for 1935 was one of the State's largest. The prices charged by the warehousemen were fair. There was no demand for the regulation by the tobacco growers. There was no Board or Commission created to constantly exercise jurisdiction over this subject. The General Assembly of Georgia by the purported Act made hard and fast prices for the services of auctioning and weighing and handling tobacco. It reduced the prices for these services. The purpose of the Act is not to regulate the business, but simply to reduce those fees. There are many circumstances which constantly change in reference to the quantity of tobacco. First, the amount grown in Georgia; second, the amount grown elsewhere; third, regulation by the Government of the amount planted, the price which the crop as a whole brings, the price at which a part of the crop is sold, the effect of weather and crop disease. Each one of these things affects the return to the appellants. No one of them was taken into consideration by the General Assembly. The amount of money invested in this business was neither ascertained nor shown to any legislative committee.

In the Nebbia case, there was a long investigation, many witnesses were examined, more than twenty-three hundred pages of testimony were taken; the value of the property used in the dairying business in New York was ascertained; the conditions under which the business was conducted were carefully ascertained in great detail. A board having jurisdiction over the subject of dairying was created.

In the case at bar, the prices for the services rendered were decreased, and this came about without any investigation of the circumstances under which the services affected are rendered; of the profits, if any, of the appellants; of the value of the property devoted to this service. The result of this is that the effect of the Act is unjust, unreasonable and arbitrary.

It will be remembered that in the note to the Nebbia case it is shown that this Court thought that the regulation of the businesses referred to was condemned, because the statutes involved were unjust, unreasonable and arbitrary. When we compare what was done in the case at bar with what was done in the cases referred to in the Nebbia case, and hereinbefore discussed, we find that in the case at bar there is more of unreasonableness, more injustice, and more of arbitrariness than in any of those cases.

The first act of injustice in the case at bar is that the prices were fixed without consideration of the value of the services for which they were fixed or of the product involved. These prices were fixed—reducing the former charges—without considering the circumstances under which a tobacco warehouseman conducts his business. They were fixed without considering the changing circumstances surrounding this business, which are wholly beyond the control of the appellants and which come from season to season and to which reference has already been made.

The prices fixed in the purported Act are unjust, for the reason that they are hard and fast. No board or commission was appointed to have jurisdiction over the subject matter.

This Court states in *Norfolk & Western Railway Co. v. Public Service Commission of West Virginia*, 265 U. S. 70, at 74:

> "The validity of regulatory measures may be challenged on the ground that they trangress the Constitution; and thereupon it becomes the duty of the court, in the light of the facts in the case, to determine *whether the regulation is reasonable and valid or essentially unreasonable, arbitrary, and void.*" (Italics ours.)

This Court cites *Burns Baking Co. v. Bryan*, 264 U. S. 504, as supporting authority.

In *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, a State law forbade the use in comfortables of shoddy even when sterilized. The Court held the statute arbitrary and unreasonable. The headnotes contain the following:

> "Legislative determinations are entitled to great weight; but it is always open to interested parties to show that the legislature has transgressed the limits of its power.
>
> "Invalidity of a legislative act may be shown by things that may be judicially noticed, or by facts established by evidence, the burden being on the attacking party to establish the invalidating facts."

This Court, at page 415, held:

> "The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment."

This Court cites *Adams v. Tanner*, 244 U. S. 590, 596;

Meyer v. Nebraska, 262 U. S. 390; *Burns Baking Co. v. Bryan*, 264 U. S. 504.

In *Washington ex rel Seattle Title Trust Co., Trustee, etc., v. Roberge, Supt. of Building of Seattle*, 278 U. S. 116, a zoning ordinance was under consideration. In the first headnote it is stated:

> "Zoning measures must find their justification in the police power exerted in the public interest; unnecessary and unreasonable restrictions may not be imposed upon the use of private property or the pursuit of useful activities."

The opinion, at page 121, states:

> "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." Citing *Lawton v. Steele*, 152 U. S. 133, and many other cases which have been heretofore cited.

THE POWER OF THE COURTS IS NOT CONCLUDED BY ACTS OF THE LEGISLATURE.

This subject was recently reviewed by this Court in the case of *Borden's Farm Products Co., Inc., v. Baldwin, Commissioner*, 293 U. S. 194. At page 209 of this decision it is held:

> "Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78-80; *Hammond v. Schappi Bus Line*, 275 U. S. 164,

170-172; *O'Gorman & Young v. Hartford Insurance Co.*, 282 U. S. 251, 256-258. It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack. When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. *Lindsley v. Natural Carbonic Gas Co.*, supra; *Clarke v. Deckebach*, 274 U. S. 392, 397; *Lawrence v. State Tax Comm'n*, 286 U. S. 276, 283. The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court. Still, the statute may show on its face that the classification is arbitrary (*Smith v. Cahoon*, 283 U. S. 553, 567) or that may appear by facts admitted or proved. *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417; *Air-Way Electric Corp. v. Day*, 266 U. S. 71, 85; *Concordia Insurance Co. v. Illinois*, 292 U. S. 535, 549. Or, after a full showing of facts, or opportunity to show them, it may be found that the burden of establishing that the classification is without rational basis has not been sustained. *Lindsley v. Natural Carbonic Gas Co.*, supra; *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342; *Radice v. New York*, 264 U. S. 292; *Clarke v. Deckebach*, supra; *Ohio Oil Co. v. Conway*, 281 U. S. 146; *Tax Commissioners v. Jackson*, 283 U. S. 527. But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of

governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support."

THE POWER OF THE STATE TO REGULATE A BUSINESS MUST BE REASONABLY EXERCISED.

This subject is expressed in *Banton, District Attorney, v. Belt Line Railway Corp.*, 268 U. S. 413, 421-422. There were involved in that case rates on certain commodities which constituted a part of the Company's business and not all of its business. The case was, therefore, similar to *Northern Pacific Ry. v. North Dakota*, 236 U. S. 585; *Norfolk & Western Ry. v. West Virginia*, 236 U. S. 605; and *Northern Pacific Railway v. Department of Public Works of Washington*, 268 U. S. 39. This Court in the *Banton* case, after referring to these cases, said:

"The State is without power to require the traffic covered by the fare enjoined to be carried at a loss or without substantial compensation over its proper cost. And such cost includes not only the expenditures, if any, incurred exclusively for that traffic, but also a just proportion of the expenses incurred for all traffic of which that in question forms a part. The cost of doing such business is not, and properly cannot be, limited to the amount by which total operating expenses would be diminished by the elimination of, or increased by adding, the transfer passengers in question. It would be arbitrary and unjust to charge to that class of business

only the amount by which the operating expenses were, or would be, increased by adding that to the other traffic carrier. Outlays are none the less attributable to transfer passengers because also applicable to the other traffic. Operating expenses which are incurred on account of all passengers carried, and which are not capable of direct allocation to any class, should be attributed to the transfer passengers in question in like proportion as such expenses are fairly chargeable to other passengers receiving like service. While the carrier has no constitutional right to the same rate or percentage of return on all its business, the State may not select any class of traffic for arbitrary control and regulation. Broad as is its power to regulate, the State does not enjoy the freedom of an owner. Appellee's property is held in private ownership; and, subject to reasonable regulation in the public interest, the management and right to control the business policy of the company belong to its owners. *Northern Pacific Railway v. North Dakota*, 236 U. S. 585, 595, 596; *Norfolk & Western Ry. v. West Virginia*, 236 U. S. 605, 609; *Interstate Commerce Commission v. Chicago, G. W. Ry.*, 209 U. S. 108, 119."

As far back as *Smyth v. Ames*, 169 U. S. 466, 526, it was held:

"In view of the adjudications these principles must be regarded as settled:

"* * * *

"2. A State enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal

protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States."

Again in that case, at page 527, this Court discussed the power of the railroad to make reasonable maximum rates and said:

> "These words (reasonable maximum rates) strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness. Be this as it may, it cannot be admitted that the power granted may be exerted in derogation of rights secured by the Constitution of the United States, or that the judiciary may not, when its jurisdiction is properly invoked, protect those rights."

It is true enough that this language was used in reference to a railroad. It applies no less to all other persons and corporations.

Reasonableness of the Charges Prescribed by the Act.

We have heretofore discussed the effect of the scale of charges prescribed by this Act on appellants' revenue under Point A, page 54, et seq. supra. It is apparent from the evidence there detailed that the scale of charges prescribed by the Act is unreasonable, arbitrary and capricious.

The End Sought to be Achieved by the Legislature Is Not Apparent.

This Court has held repeatedly that a police regulation must be aimed at an end that is legitimate and within the

scope of the Constitution and must be accomplished by means which are appropriate and plainly adapted to accomplish this legitimate end. It is not apparent from the Act itself what end is in view. Certainly if the aim of the statute was to put more money into the growers' pockets at the expense of the warehousemen, it is discriminatory and class legislation at its worst. Also no minimum rate is fixed which is arbitrary. If the aim of the statute was to reduce the number of warehouses in Georgia by means of price fixing, not only is the end unconstitutional but the means adopted are improper and unlawful. There is no attempt to make warehouses per se public utilities. There is no supervising body, such as the Public Service Commission, placed in charge of these rates, with a complimentary right of franchise; there is no hearing provided for at which the rates may be changed according to the fluctuation in price and production of the tobacco grown. Some of appellees' witnesses testified that they hoped by means of price reduction to limit the number of warehouses and thereby increase the length of the selling season. Certainly this is not a constitutional end and the means adopted are anything but appropriate.

The Evidence Shows the Enactment of the Statute Was Made Without Investigation.

The knowledge of the tobacco warehouse business of Representative Swindle, R. p. 464, and Senator Gaskins, R. p. 493, as well as Senator Milhollin, R. p. 449, as shown by their testimony, is scant. They were the co-authors of the statute under attack. They personally had never operated a warehouse, but all were growers of tobacco. Their knowledge can safely be said to represent the extent of the information

and facts before the Legislature at the time the statute was under consideration. Mr. Swindle's testimony with regard to this is found at R. p. 464, et seq., and on cross examination at R. p. 477, et seq. Mr. Gaskins' testimony is found at R. p. 496, and on cross examination at R. p. 504.

Senator Milhollin said in part, at R. p. 550:

> "I am at the present time Senator for the 46th District of Georgia and in the State Senate. I am one of the proponents of the tobacco warehouse charges bill passed by the recent session of the Legislature; I was interested in passing that bill. I devoted considerable time to it. I didn't devote any time to the study of the tobacco warehouse charges before the introduction and passage of that bill. I didn't make any investigation as to the charges running too high or too low for the farmer before pushing the legislation; I pushed it because it would lower the prices to the farmers and myself, a grower; to myself, a grower, and the farmers and others. Since then I have made a comparative study of it. From the study I have made of the charges of the tobacco warehouses, the present charges used in Georgia prior to the passage of this law, and from my experience in the ownership or part ownership of a warehouse and my experience in growing and marketing tobacco, I think the charges fixed by the law in Georgia are fair both to the warehouses and the farmers. There was not any considerable demand among the people of my Senatorial District, among the farmers and growers, for a reduction in warehouse charges, not to me there was not. I don't know where there was over the tobacco belt a considerable demand to that effect before that time or not. Since that time there has been quite a demand for reduction of the charges. I don't know whether or not the growers had been to the other representatives

and senators making an effort to reduce charges by law in previous legislatures; I don't know about that."

The reason for the passage of the Act may be found in the testimony of Senator Gaskins, who testified at R. p. 493, as follows:

"As a contrast between the living conditions of the two, the majority of the growers that grew this tobacco for the period from 1930 including 1930 and up to 1934 and in lots of instances the growers of 1934, the majority of the farmers are ragged and were short of clothes during this depression and their fences were broken, rotten and down and to a large extent their mules are in bad condition, houses in bad repair; and the warehousemen and their skilled help, as they describe it, stay in the best hotels, wear better clothes than the majority of the growers can muster up on Sunday, for everyday. (R. p. 503.)

"The majority of the farmers or growers ride in wagons, old wagons with the tires about gone, or ride around in Hoover carts. That is a cart made out of two wheels off of an old automobile. The majority of the tobacco warehousemen and their skilled hired help, as they describe them, ride by in automobiles and drive them at high speed at what we country people usually call reckless.

"Taking it as a whole, the majority of the growers, their recreation is mighty limited. Any recreation for them or their families is mighty limited. If they go fishing occasionally, it is all right. These warehouse operators expend a great deal in expenses, having barbecues prepared for them. Some of my help on my farm has been hired to prepare big barbecues for them.

"The majority of them are constantly out hunting in my section. Some of them have bought high-priced bird

dogs, when the tobacco grower can hardly buy enough of the necessities of life; and they spend money recklessly for things that would be classed by the usual tobacco grower as really unnecessary.

"I would answer that in this way, that if the average tobacco grower spent money as recklessly and with as little consideration as the warehousemen and skilled labor that have operated the warehouses in this town here—that, if he spent money that reckless, he could not operate. Well, I will change that by saying this: I will say this: He could not get money to spend that way. If he had enough money to spend that reckless he could not last any time in the farming business and tobacco growing business." R. p. 503.

We submit the foregoing testimony for the purpose of showing in what strange and irrelevant circumstances the bill involved in this case originated in the General Assembly of Georgia. This evidence is quoted without reference to any evidence which has been given by other witnesses in regard to it.

CONCLUSION

Our State and National governments are *constitutional* democracies and not *legislative*. The Constitution of the United States and the Constitution of the State of Georgia are contracts or compacts of the people with themselves and with each other.

There is no provision in the Constitution of the State of Georgia, approved by the Georgia citizens, that warehouses, much less tobacco auction places, are public businesses, public utilities, as was true with regard to grain elevators in the Munn case. There is no showing of any evil, any persistent and palpable frauds in this business as carried on in Georgia. The Legislature by its enactment of this statute regulating tobacco warehouse charges in effect declares this business to be a public business. If limitation of the State's power is found at all in the Commerce Clause and Fourteenth Amendment of the Constitution of the United States, the facts of this case demand a holding that the statute is beyond the power or, at all events, an improper exercise, of power by the General Assembly of the State of Georgia.

Respectfully submitted,

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April 26, 1937.

C.